IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 83

United States of America,
Appellant,

v.

The Philadelphia National Bank and
Girard Trust Corn Exchange Bank

BRIEF FOR APPELLEES

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

Arthur Littleton
Ernest R. von Starck
Donald A. Scott
2107 Fidelity-Phila. Trust Bldg.
Philadelphia 9, Penna.
Attorneys for The Philadelphia National Bank, Appellee.

Philip Price
Carroll R. Wetzel
John J. Brennan
Minturn T. Wright, III
1600 Three Penn Center Plaza
Philadelphia 2, Penna.
Attorneys for Girard Trust Corn Exchange Bank, Appellee.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

INDEX

CITATIONS

CASES:

In The

Supreme Court of the United States

October Term, 1962

No. 83

United States of America,
Appellant

v.

The Philadelphia National Bank and
Girard Trust Corn Exchange Bank

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether the proposed merger of appellees, pursuant to the national banking laws and the approval of the Comptroller of the Currency acting under the Bank Merger Act of 1960, is subject to section 7 of the Clayton Act.

2. Whether it was clearly erroneous for the district court to find that the record established that the merger of appellees would not constitute an unrea-

sonable restraint of trade under section 1 of the Sherman Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, and section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, are printed at pages 2-3 of appellant's brief. The Bank Merger Act of 1960, 74 Stat. 129, 12 U.S.C. § 1828(c) (Supp. II), and section 215(e) of the National Banking Laws, 73 Stat. 462, 12 U.S.C. § 215(e) (Supp. II), are set forth in the appendix to this brief at pages 81 and 82.

STATEMENT OF THE CASE

INTRODUCTION

The Philadelphia National Bank ("PNB"), a national bank, and Girard Trust Corn Exchange Bank ("Girard"), a Pennsylvania state bank, adopted a plan of merger on November 15, 1960 and filed an application for approval of the merger (GX 57, R. 2423)* with the Comptroller of the Currency as required by the Bank Merger Act and section 215 of the national banking laws. In accordance with the provisions of the Bank Merger Act the Comptroller received advisory reports "on the competitive factors involved" from the Board of Governors of the Federal

* Appellees have followed the method of designating exhibits and findings of fact set forth at page 4, footnote 2 of appellant's brief.

Reserve System (GX 161, R. 2822), the Attorney General (GX 162, R. 2834) and the Federal Deposit Insurance Corporation (GX 163, R. 2845). After consideration of the competitive factors and the banking factors specified in the Act, the Comptroller found that the merger would be in the public interest (GX 164, R. 2857) and gave his approval of it on February 24, 1961 (DX 14, R. 3049). The following day the complaint in this action was filed by the Attorney General to enjoin the merger as an alleged violation of section 7 of the Clayton Act and section 1 of the Sherman Act.

The trial began on June 5, 1961 and ended on August 3, 1961. Appellant offered 255 exhibits and called 21 witnesses. Appellees offered 70 exhibits and called 29 witnesses. After hearing oral argument the district court filed, on January 15, 1962, an opinion accompanied by findings of fact and conclusions of law (R. 3629) and an order dismissing the complaint (R. 3669). Appellant took an appeal to this Court and probable jurisdiction was noted on May 21, 1962, 369 U.S. 883 (1962).

The district court's conclusion that the proposed merger would not violate section 7 of the Clayton Act or section 1 of the Sherman Act was based on evidence which disclosed the nature of commercial banking, the complexity of banking markets, the peculiar nature of the regulated competition among commercial banks, and particularly the structure of commercial banking in the Philadelphia area. In reaching this conclusion the district court found that "commercial banking is wholly different from industrial or commercial busi-

nesses" (Fdg. 9a, R. 3490), and rejected the argument of appellant that statistics and size comparisons, which might be some evidence of power to control the market in industry or commerce, have a similar significance in commercial banking. Whatever appellant's figures might mean if they really represented market shares, and if this case dealt with steel companies, shoe companies, or railroads, the district court found that they do not establish, or even imply, a substantial lessening of competition, or a tendency to create a monopoly, or an unreasonable restraint in the field of commercial banking in the Philadelphia area.

This Statement will be devoted to the facts that led the district court to reject appellant's argument, which it said was not supported by "a single shred of evidence" (R. 3666).*

COMMERCIAL BANKING AND COMPETITION

Commercial banks are the only institutions which are permitted by law to receive demand deposits (R. 3646), and by far the largest part of a commercial bank's resources is derived from such deposits. For example, approximately 72% of the merged bank's resources will be demand deposits which the depositors can withdraw immediately, and approximately 15% will be time and savings deposits which the depositors can withdraw upon short notice (GX 57, R. 2449). Consequently a total of 87% of the merged bank's assets will be subject to the dictates of its customers.

* A summary of the evidence may be found at pages 4 and 22-31 of Girard's motion to affirm.

Unlike an industrial or commercial enterprise which owns or controls its assets, a commercial bank "owes" the great bulk of its resources and owes them to the very persons whose patronage it seeks to retain.

The funds so obtained by commercial banks plus their relatively small invested capital, less the reserves required by law and sound banking practice, are lent to customers in a variety of ways, such as by short-term secured and unsecured loans, mortgage loans, and installment loans on automobiles and other consumer goods (GX 57, R. 2451). In addition, some commercial banks, including appellees, provide trust services and many other services such as investment advice, credit information, and payroll accounting (DX 38, R. 3176). However, the bulk of a commercial bank's business generally consists of short-term loans because long-term loans would inhibit immediate repayment of the demand deposits from which the largest portion of the loans has been made (R. 3647).

Customers with high borrowing requirements regularly maintain substantial demand deposits which on the average far exceed their loans (Fdg. 197a, R. 3517). For example, the average demand deposits of PNB's largest borrowing customers are twice as great as their average loans (DX 26, R. 3163) and Girard's are more than one and a half times as great (DX 40, R. 3181). This excess of deposits, less reserves, is available for lending to other customers (R. 937).

A commercial bank is, in general, not permitted to have outstanding loans to any one customer in excess of 10% of the bank's capital and surplus (R.

3647). This lending limit is of no consequence to the average borrower, but it is a matter of concern to larger borrowers who generally seek out a bank which has a limit safely beyond the borrower's anticipated requirements (Fdg. 179a, R. 3513-3514). While loans which exceed a single bank's limit can be participated in by other banks, borrowers prefer not to deal with a number of participating banks because of the administrative burden, the added cost of maintaining deposit balances with a number of banks, the confidential nature of banking relationships and the time consumed in developing them (Fdg. 186a, R. 3515, 3667). For that reason and because of the possible loss of customers and deposits, large banks seldom participate loans to other large banks (*Ibid.*).*

Commercial banks are subject to extensive regulation by law and by the Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation and state banking authorities (Fdg. 10a, R. 3490). The principal purpose of this regulation is to protect the banks' depositors and the economy from what have been the disastrous effects of unrestricted competition in the past (Fdg. 11a, R. 3490; R. 1370-1371).

Banks must obtain approval from public authorities not only in order to enter the business but also for the establishment and location of the offices where they will conduct it (Fdg. 19a, R. 3491).

* Small banks participate loans to large banks where they already maintain substantial deposits as compensation for such participations and other correspondent services (Fdg. 186(d)a, R. 3515).

Commercial banks are not permitted to pay interest on demand deposits and the maximum interest which they may pay on time and savings deposits is fixed by regulation (Fdg. 13a, R. 3490).

The maximum interest rates which may be charged on loans are fixed by state usury laws and, while in many states these laws do not apply to loans to corporations, in practice they become a ceiling for most such loans (R. 1463-1464). Minimum interest rates are directly affected by a variety of forces operating in the money market. These include the open market practices of the Federal Reserve Board in buying and selling government securities, which affect the supply of lendable funds; the reserve requirements of the Federal Reserve Board and the state banking authorities, which also affect the supply of lendable funds; and the rediscount rate fixed by the Federal Reserve Banks for loans they make to member banks. All of these forces significantly influence the supply of and demand for money and thus directly affect the "prime rate" charged by the nation's largest banks to their customers with the highest credit standing (Fdg. 17a, R. 3491).* The prime rate in turn sets a practical minimum for interest rates throughout the country. Between these maximum and minimum rates the interest charged by a bank to a particular customer depends primarily upon that customer's credit standing. Since credit evaluations by different banks are generally similar (Fdgs. 30a-31a,

* The merged bank would not be large enough to have any influence in setting the prime rate (Fdg. 18a, R. 3491).

R. 3492; R. 940, 1243) there is little price competition in the setting of interest rates (R. 1364, 1366-1369).

In addition there are simple business reasons why there is no significant interest rate competition among commercial banks. If a bank were to reduce its rates it would soon exhaust its available funds, and if it were to increase them it would quickly lose borrowers to other banks (Fdgs. 32a-33a, R. 3492).

Commercial banks must be concerned not only with competition from other commercial banks but also with competition from other financial institutions and alternative investments. Exhibit D 41 (R. 3182-3184) shows such competition for each banking function. For example, when interest rates are favorable large corporate depositors invest working capital, that might otherwise be on deposit, in short term government obligations, commercial paper, bankers' acceptances and repurchase agreements (R. 1381, 1719-1721). Again, the amount of savings deposits held by commercial banks is far less than the amount held by mutual savings banks, savings and loan associations and credit unions which are permitted to pay higher rates (DX 32, R. 3168; DX 34, R. 3171; DX 61, R. 3283; R. 1388-1391). In their lending functions commercial banks must meet competition not only from those institutions but also from small loan companies, consumer discount companies, commercial finance companies, insurance companies, pension trusts and factors (R. 1393-1401, 1729-1730).

The nature of commercial banking makes possible successful competition between small banks and large.

On the strength of the testimony of experienced banking witnesses, the district court found that the principal factors in competition among commercial banks are convenience, quality of service, personal relationships, and the capacity to meet the requirements of customers (Fdg. 37a, R. 3493). In this connection the district court made these two significant findings:

> "Large commercial banks do not have a competitive advantage for business within the range of the resources of smaller banks. In that range, small banks are able to compete as effectively as large banks." (Fdg. 40a, R. 3493).

> "The growth of a small bank is not adversely affected by the existence of a large competing bank; in most cases small banks grow faster than large banks, which find it difficult to maintain their positions relative to small banks." (Fdg. 41a, R. 3493).

Stated another way, this equality of competitive opportunity in commercial banking prevents large size from conferring "dominance", the power to control either customers or other banks. Each bank available to a potential or existing customer has the same chance to attract or hold that customer so long as his requirements are within the range of the bank's resources.

STRUCTURE OF PHILADELPHIA BANKING

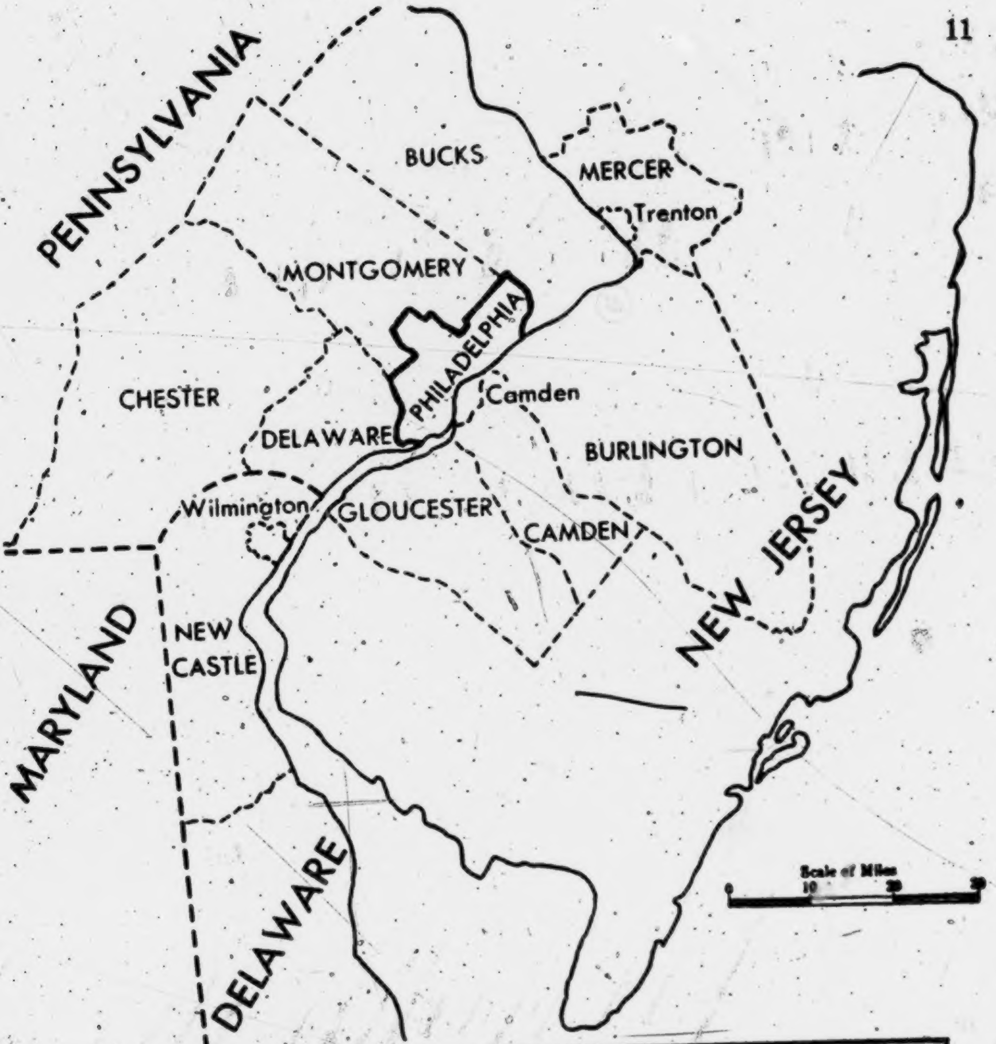
Commercial banks sell their services in local, regional, national and international markets, which

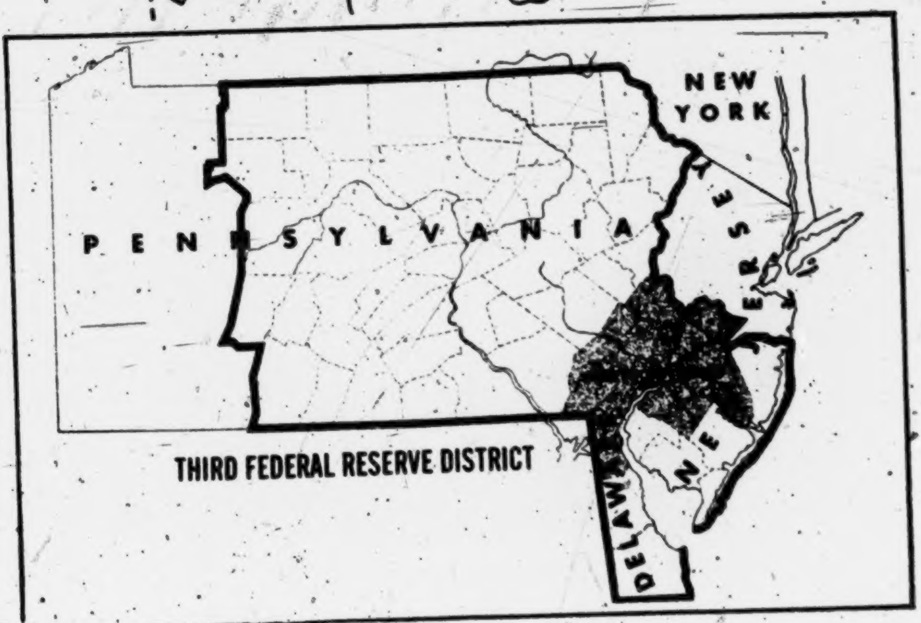
overlap and are difficult to define (Fdg. 45a, R. 3494). Appellees do business in all of these markets, but appellant has chosen as the relevant geographic market a local area determined by political boundaries alone. Appellant has defined this market as Philadelphia County and the three adjacent Pennsylvania counties, Bucks, Montgomery and Delaware. The map on the following page shows those counties as well as the others referred to in the record, which are a part of the Third Federal Reserve District.

Philadelphia is the industrial, commercial and financial hub of a metropolitan area consisting of those four counties and Chester County in Pennsylvania, as well as Camden, Burlington and Gloucester Counties in New Jersey (R. 2276, 2290). This is the standard census area (R. 2274). The district court concluded that at the very least the relevant geographic market consists of this eight-county area, or the slightly larger ten-county area which includes also Mercer and New Castle counties, "and definitely New York City" (R. 3653).

Even the most modest customers are free to do business across political boundaries and do so (Fdg, 49a, R. 3494). Banks in New York, Chicago, San Francisco and many other large cities actively solicit and obtain accounts in the Philadelphia area* and conversely appellees solicit and obtain business from

* Fdg. 52a, R. 3495-3496; R. 1237-1238, 1611-1612, 1614-1616, 1620-1623, 1625-1628, 1663, 1702-1704, 1714, 1797, 1825-1826, 1898-1899, 1941, 2025-2028, 2065-2070, 2098-2100, 2103-2104, 2112, 2117-2123, 2126-2133, 2142-2145, 2148, 2152-2155, 2167-2175, 2180-2181.





THIRD FEDERAL RESERVE DISTRICT

distant places (Fdgs. 50a-51a, R. 3494-3495). The far reaching nature of appellees' banking business is reflected by the fact that 44% in dollar amount of their loans are made to borrowers located outside the four-county area (DX 30, R. 3167). Actually appellees derive a greater amount of their commercial and industrial loans from the northeastern United States outside the Third Federal Reserve District than they do from Bucks, Delaware and Montgomery Counties (DX 63, R. 3285).

The district court concluded that a relevant market area must be determined not only from the point of view of the bank but also from the point of view of the customer, and that the customer's geographic market for banking services is determined by the location of the alternative sources from which he can obtain those services (Fdgs. 46a-49a, R. 3494). Customers of appellees representing at least 68% in dollar volume of their commercial and industrial loans, and at least 64% in dollar volume of their business demand deposits have banking choices which include commercial banks located outside the four-county area (Fdg. 52(e)a, R. 3496; DX 43, R. 3185). Upon the basis of such evidence the district court concluded that the relevant market area is probably "the greater part of the northeastern United States" (R. 3653).

Despite the fact that the district court refused to accept the four-county area as the relevant market, it nonetheless tested the competitive effects of the proposed merger in that limited area (R. 3654). It

noted that borrowers would have available the following alternatives within that area after the merger* (Fdg. 158a, R. 3510, 3660):

Size of Loan	Number of Commercial Banks in the 4-County Area After the Merger Able to Accommodate Such Customers
Under $10,000	41
$ 10,000–$ 24,999	39
25,000– 49,999	35
50,000– 99,999	27
100,000– 249,999	18
250,000– 499,999	10
500,000– 999,999	7
1,000,000– 2,499,999	4
2,500,000– 4,999,999	3
5,000,000– 7,999,999	2
8,000,000–15,000,000	1

The district court found that these banks "today are strong and vigorous competitors in offering commercial banking services to the public" (Fdg. 123a, R. 3505). It also found that banks from other cities are active competitors in this area, particularly for the larger loans. Many of these competitors are located in New York City where, for example, there are 17 banks with lending limits higher than $1,000,000 (DX 39, R. 3179). The district court ob-

* PNB has a lending limit of $8,000,000 and Girard's limit is $6,000,000. The merger agreement provides for an increase of the capital stock and surplus of the proposed new bank at merger from the combined total of $140,000,000 to $150,000,000, principally by a transfer from undivided profits (GX 57, R. 2452). The merged bank will therefore have a lending limit of $15,000,000.

served that "the main bone of contention here is that the merger will have its most serious effects on small and medium size borrowers. The above figures, however, indicate to the Court that there are more than an adequate number of sources for these types of borrowers. In fact, it has been established that a borrower turned down by three banks would be unable, with few exceptions, to obtain a loan at another commercial bank. And, of course, those borrowers in need of larger loans are not limited to the few banks in Philadelphia capable of making such a loan" (R. 3660).

The statistics relied on by appellant to show a restraint of trade in the four-county area include only the amount of loans, deposits and other types of banking business done throughout the United States by each commercial bank with headquarters in the four-county area. For each class of business the amount done by appellees is then expressed as a percentage of the total amount done by all those banks as though this figure represented a market share. For example, the combined total loans of appellees is computed to be 34% of all the loans held by banks physically located in the four-county area. There is no breakdown of these figures between the amounts representing loans made to customers inside the four-county area and those made to customers outside, although as to appellees it is known that 44% of their loans are made to borrowers located outside the four-county area (DX 30, R. 3167). Nor has appellant included

any figures showing the amount of loans made to customers inside the area by banks located outside the area, although witness after witness testified that large banks from New York and other cities regularly solicit and obtain business in the Philadelphia area (R. 3653; see fn., p. 10, *supra*).

No witness was offered by appellant to provide any interpretation or explanation of these figures or of their significance in support of appellant's theories. The district court necessarily concluded that there is no evidence disclosing appellees' portion of the banking business done in the four-county area or any other area (Fdgs. 56a-57a, R. 3496-3497).

CONCENTRATION IN COMMERCIAL BANKING

The proposed merger would reduce from 42 to 41 the total number of existing banks in appellant's four-county area capable of lending a single customer up to $10,000. It would reduce from 8 to 7 the number of banks in that area capable of lending as much as $1,000,000 to a single customer. It would not reduce the number of banks from New York, Boston, Chicago and other cities doing business in Philadelphia, but it would for the first time create a bank in Philadelphia capable of lending up to $15,000,000 to one borrower. The district court concluded that "all types of customers, including small businessmen, would have ample alternative choices for commercial banking services after the merger" (Fdg. 161a, R. 3511) and that the availability of these alternatives

"leads to the inescapable conclusion that any tendency toward monopoly or oligopoly at this stage is non-existent" (R. 3662).

Prior to 1951, PNB and Girard were wholesale banks dealing primarily with large customers (Fdg. 101a, R. 3502). Because of the population growth in suburban areas, the expansion of commerce and industry, and the increase in the importance of small customers, PNB and Girard independently changed their policies and began to enter into retail banking services and branch banking (Fdg. 102a. R. 3502-3503). The mergers which both banks engaged in after 1951 were for the purpose of effectuating this new policy (*Ibid.*). The district court concluded that "it has been shown that mergers with existing banks in the suburbs of Philadelphia were, in many cases, the only feasible way for larger banks to follow the migration of many of their customers into these areas. In addition, in many cases, it appears the small banks in the four-county area have found mergers with larger banks to be a solution to their problems of inadequate banking services; rising costs, and management succession." (R. 3661). The district court added that "although the defendants have engaged in prior mergers, these mergers have had valid business purposes as the motivating force" (R. 3661).

These mergers with smaller banks in the suburbs have increased the banking services available in those communities while at the same time they have not prevented substantial growth of the other banks in those

areas (Fdgs. 103a-105a, 108a-122a, R. 3503-3505). On the basis of the testimony of the Philadelphia banking witnesses, including appellant's one expert on Philadelphia banking (R. 976), the district court concluded that the effect of prior bank mergers in the Philadelphia area had been to increase and sharpen competition among commercial banks (Fdg. 107a, R. 3503).

The district court, after reviewing the "concentration" percentages computed by appellant,* found that "no dangerously potential concentration will result from this merger" (R. 3656-3658). In reaching this conclusion, the court considered percentage figures from other cities in the United States. On the following page there is set forth a list of 110 cities in the United States with population of 100,000 or more ranked in accordance with the percentage of total bank assets held by the largest bank in each city. The largest bank in each of 78 of those cities holds more than the 36.2% which would be held by the merged bank in Philadelphia. Moreover, of 224 cities with population of over 50,000, there are 190 which have a commercial bank holding 35% or more of the total commercial banking assets in the city, and 96 which have a bank holding more than 50% of such assets (DX 46, R. 3193-3207; Fdg. 136a, R. 3507). There was no evidence offered to show that such concentration in any bank in any city had given it an advantage

* As generally used by appellant the term "concentration" appears to mean the percentage of banking resources in a particular locality held by a bank or banks. See Fdgs. 374-384, R. 3411-3413.

Assets of the Largest Commercial Banks as Per Cent of Total Assets of all Commercial Banks in Cities with Population Over 100,000

Percentages as of June 30, 1956, except Philadelphia, December 31, 1960, giving pro forma effect to the merger

1. Gary, Ind.	88.4	56. Cleveland, Ohio	45.2
2. Dearborn, Mich.	82.2	57. Rochester, N. Y.	44.9
3. Niagara Falls, N. Y.	79.2	58. Duluth, Minn.	44.7
4. Cambridge, Mass.	73.1	59. Amarillo, Texas	42.9
5. Greensboro, N. C.	69.4	60. Tulsa, Okla.	42.3
6. Savannah, Ga.	69.1	61. Indianapolis, Ind.	41.1
7. Birmingham, Ala.	63.3	62. Wichita Falls, Texas	41.0
8. Yonkers, N. Y.	62.2	63. Miami, Fla.	40.9
9. Paterson, N. J.	61.9	64. New Orleans, La.	39.9
10. Dayton, Ohio	61.5	65. Erie, Pa.	39.6
11. Corpus Christi, Texas	60.4	66. Lincoln, Nebr.	39.2
12. Pittsburgh, Pa.	60.0	67. Los Angeles, Calif.	39.1
13. Montgomery, Ala.	59.3	68. Columbus, Ga.	39.0
14. Toledo, Ohio	59.1	69. Nashville, Tenn.	38.6
15. San Francisco, Calif.	58.7	70. Rockford, Ill.	38.4
16. Providence, R. I.	57.9	71. Minneapolis, Minn.	38.3
17. Camden, N. J.	56.6	72. Evansville, Ind.	38.3
18. Scranton, Pa.	56.6	73. Springfield, Mass.	38.2
19. Phoenix, Ariz.	56.5	74. Trenton, N. J.	37.8
20. Charlotte, N. C.	56.2	75. Waterbury, Conn.	37.7
21. Worcester, Mass.	56.0	76. Fort Worth, Texas	37.4
22. Knoxville, Tenn.	55.6	77. Peoria, Ill.	37.2
23. St. Paul, Minn.	55.6	78. Youngstown, Ohio	37.1
24. Madison, Wis.	55.5	79. **Philadelphia, Pa.**	**36.2**
25. Norfolk, Va.	55.1	80. Tampa, Fla.	36.2
26. Jackson, Miss.	55.0	81. Newark, N. J.	35.9
27. Chattanooga, Tenn.	54.0	82. Elizabeth, N. J.	35.8
28. Boston, Mass.	54.0	83. Dallas, Texas	35.8
29. Albany, N. Y.	54.0	84. New Haven, Conn.	35.6
30. Columbus, Ohio	53.5	85. Syracuse, N. Y.	35.2
31. Buffalo, N. Y.	52.7	86. Atlanta, Ga.	35.2
32. Bridgeport, Conn.	52.3	87. Lubbock, Texas	35.0
33. Tacoma, Wash.	50.5	88. Kansas City, Mo.	34.8
34. New Bedford, Mass.	49.7	89. Jacksonville, Fla.	34.8
35. Hartford, Conn.	49.2	90. Austin, Texas	34.7
36. Oklahoma City, Okla.	48.3	91. Little Rock, Ark.	33.9
37. Allentown, Pa.	48.3	92. Cincinnati, Ohio	33.8
38. Milwaukee, Wis.	48.2	93. Houston, Texas	32.9
39. Portland, Oreg.	47.9	94. Canton, Ohio	32.0
40. Omaha, Nebr.	47.9	95. St. Petersburg, Fla.	31.4
41. Mobile, Ala.	47.7	96. Des Moines, Iowa	31.2
42. Utica, N. Y.	47.6	97. Richmond, Va.	31.0
43. Wichita, Kans.	47.6	98. Louisville, Ky.	30.7
44. Albuquerque, N. M.	47.4	99. Washington, D. C.	30.5
45. El Paso, Texas	47.1	100. Topeka, Kans.	28.7
46. Detroit, Mich.	46.9	101. St. Louis, Mo.	27.8
47. Akron, Ohio	46.7	102. Baton Rouge, La.	27.8
48. Seattle, Wash.	46.1	103. San Antonio, Texas	27.7
49. Spokane, Wash.	45.8	104. Jersey City, N. J.	26.8
50. Memphis, Tenn.	45.7	105. Chicago, Ill.	25.8
51. Portsmouth, Va.	45.6	106. Salt Lake City, Utah	24.5
52. Hammond, Ind.	45.5	107. Kansas City, Kans.	24.1
53. South Bend, Ind.	45.5	108. Baltimore, Md.	23.1
54. Fort Wayne, Ind.	45.5	109. Denver, Colo.	22.5
55. Shreveport, La.	45.4	110. New York, N. Y.	21.0

(DX 47, R. 3208)

over other banks or had had any effect whatever on competition. The only evidence was to the contrary (R. 1954, 1956).

Lewellyn A. Jennings, former First Deputy Comptroller of the Currency, who had more than thirty years' experience in banking throughout the country (R. 1929-1935), testified that the large percentage of local bank assets held by the largest bank in so many cities is due to "a need in these communities for a lead bank large enough to accommodate the borrowing needs, the general banking needs of commerce and industry in the communities" (R. 1956). Mr. Jennings also testified that studies of banks over the ten-year period, 1946-1956, showed that in most large cities the largest banks lost ground to their competitors (R. 1958-1960; DX 46, R. 3195-3207; DX 21, R. 3099-3151), and that studies of the 100 largest banks in the United States showed that they held 56.7% of all commercial bank deposits in 1940 and only 45.7% in 1958 (R. 1962; DX 48, R. 3247). Finally, he stated that "concentration" measured as appellant measures it in this case, "is not an effective deterrent in any way to the adequate functioning and the competitive position of the smaller institutions" (R. 1959). This is consistent with the conclusion of the FDIC in a study of banking concentration (DX 48, R. 3258) that ". . . there is no fixed relationship between changes in concentration and changes in competition."

REASONS FOR THE MERGER

Philadelphia area banks have met the postwar problems presented by the wider distribution of population and the increasing needs of individuals and small businesses by enlarging the number of banking offices in the area from 178 to 283 and by providing a full line of banking services at these locations (GX 13(S), R. 2385; R. 1596-1598). There is ample banking accommodation to meet the needs of individuals and smaller businesses (R. 3660). On the other hand, banking resources and lending limits have not kept pace with the credit requirements of the larger local enterprises. Exhibit D 25 (R. 3157) shows that in the Philadelphia area between 1940 and 1960 the total sales of large corporations, value added by manufacture and personal income have each increased four-fold. During the same period the total assets of Philadelphia banks and the PNB lending limit, which is the largest in the area, have increased by only half as much. Although Philadelphia is fourth or fifth among the twelve largest metropolitan areas in the United States when ranked on the basis of the usual measures of economic activity, it ranks only ninth on the basis of the size of its largest bank (GX 57, R. 2531-2535).

PNB has a lending limit of $8,000,000 and Girard's limit is $6,000,000 (DX 15, R. 3052). On the basis of the testimony of executives of eight competing Philadelphia banks, executives of seven of the larger companies in the Philadelphia area, an officer of the Philadelphia Industrial Development Corporation, the

Mayor of Philadelphia, a former First Deputy Comptroller of the Currency and a member of the Pennsylvania State Banking Board, the district court found "There is presently no Philadelphia bank large enough to serve adequately the banking needs of large industry in the Philadelphia area" (Fdg. 178a, R. 3513).

The district court found that the higher lending limit of $15,000,000 and the additional resources of the merged bank would permit it to serve more adequately the credit requirements of large industry, to give greater assistance to new or growing companies, and to attract new business to the Philadelphia area, which in turn would benefit other local banks (Fdgs. 193a-207a, R. 3517-3518).

As a result of the inadequacy of banking resources in the Philadelphia area, larger local enterprises have been forced to establish relationships with banks in other cities. Each appellee has lost business as a result of this movement and each is greatly concerned that it will lose more as its present customers' banking requirements increase (R. 1613-1623, 1699, 1706).

The numerical extent of the competition which appellees face from larger banks in other metropolitan centers is evident from the fact that there are twenty commercial banks in the United States which have lending limits greater than that of PNB, of which nine are in cities smaller than Philadelphia (DX 24, R. 3154; Fdg. 135a, R. 3507). The intensity of com-

petition from banks in other cities was attested to by the local businessmen and bankers who testified (Fdg. 52a, R. 3495-3496; see fn., p. 10, *supra*). For example, it was said that Philadelphia "swarms" with solicitors from outside banks (R. 1825-1826); that deposit accounts from $10,000 up are regularly sought in Philadelphia by outside banks (R. 2025-2028); and that Philadelphia is the "happy hunting ground" for New York banks (R. 1899). None of this testimony was contradicted.

The fundamental reason for the proposed merger is to correct this imbalance in Philadelphia and to meet this competition from larger banks throughout the country by providing a bank in Philadelphia with resources, lending limit and services more in keeping with the banking requirements of the larger local enterprises. This business is important to appellees. In June 1960, at least 70% of PNB's total business demand deposits were from customers for whom there is competition from banks elsewhere. Loans to such customers amounted to 74% of all its commercial and industrial loans (DX 43, R. 3185). In the case of Girard, at least 55% of its business demand deposits and 59% of its commercial and industrial loans were those of customers of the same type (DX 43, R. 3185).

Although the substantial resources and higher lending limit of the merged bank will tend to attract larger customers, to be truly competitive with the New York banks the merged bank must also offer more specialized services than are presently possible

with the existing resources and staff of each appellee. For example, departments will be organized by categories of industries in order to render expert business and banking advice (R. 1607-1608, 1710). The additional resources will also enable the bank to develop its foreign services by increasing the capital of PNB's international investment company and by forming an international banking corporation with an office in New York and, later, London (R. 1710-1712).

The district court summarized this final aspect of the case by saying (R. 3667):

"The testimony discloses that the competitive effect upon all Philadelphia commercial banks will be minimal. The larger bank, however, will be able to compete on better terms and in a better atmosphere with the banks of other cities and states that have been draining this area of banking business which might well be and perhaps properly should be handled here, and which cannot be handled under present circumstances. That it will benefit the city and area has been established clearly by a fair preponderance of the evidence, as has been set forth in the Findings of Fact of the defendants previously affirmed."

SUMMARY OF ARGUMENT

I

Section 7 of the Clayton Act is inapplicable because the proposed merger does not involve an acquisition of stock. *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Commission*, 291 U.S. 587 (1934);

United States v. *Celanese Corp.*, 91 F. Supp. 14 (S.D.N.Y. 1950); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 313 (1962). The 1950 amendment extended the Act to control asset acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission, and banks are not subject thereto. The inapplicability of section 7 of the Clayton Act to bank mergers has been consistently recognized by Congress, and was repeatedly asserted by the Department of Justice until it brought this suit.

II

The decision below was based on appellees' evidence that the proposed merger will not create an unreasonable restraint of trade in violation of section 1 of the Sherman Act, and also on the absence of any evidence from appellant that the merged bank will have the power to inhibit competition, to dominate or influence its competitors or to affect adversely the availability and adequacy of banking services to the public.

Appellees' evidence, consisting of testimony of experts with long experience in commercial banking, and of many bankers and businessmen in the Philadelphia area, showed that the merger could not and would not have an adverse effect on competition. This evidence showed that a large bank has no competitive advantage over smaller banks for business within the resources of the smaller bank, that small banks grow more rapidly than large banks, and that

because of the nature of banking and the vigor of competition among the 41 Philadelphia area banks the merged bank will have no power to affect adversely its competitors or banking competition.

The evidence showed that past mergers of Philadelphia area banks were a response to the needs of the area for better banking service. Those mergers did not adversely affect competition but on the contrary increased and sharpened it. Appellant's claim of "undue concentration" is nothing more than the use of a term common to antitrust cases involving industrial or commercial business and is based solely on statistics. Appellant made no attempt to explain the applicability of that concept to commercial banking. Banking "concentration" in Philadelphia after the proposed merger will be well below that in most other large cities, none of which was shown to be without effective banking competition or adequate banking service.

Appellant fails to recognize the essential differences between competition in commercial banking and competition in other industries. These differences arise from the unique nature of commercial banking and money and credit, and from the effect of governmental regulation which restricts competition in banking for the protection of depositors and the public. The result is that competition among banks is largely limited to convenience and quality of service and involves "price" competition only to a minor degree. Small banks can thus compete effectively with large banks for business within the range of the resources of the small bank.

Ignoring this fundamental difference appellant seeks to apply to this case the concept of "share of the market" utilized in antitrust cases involving industrial and commercial enterprises. Moreover, the statistics introduced by appellant are restricted to Philadelphia and three of its six contiguous counties and are meaningless since the relevant geographic market is far larger than those four counties. Appellant's statistics are also valueless because they include as banking business in the Philadelphia area all of the business of Philadelphia area banks from wherever derived and because they exclude extensive business done in the area by banks located in New York and elsewhere.

The evidence also establishes that the purpose of the proposed merger is to give Philadelphia for the first time a bank large enough to meet the banking needs of the larger business customers in the area and to check the flow of banking business from the Philadelphia area to large banks in New York and other cities. The merged bank will have the resources necessary to retain and acquire such business and to offer competition which does not now exist, all of which will in turn benefit the entire Philadelphia community. This benefit to the community and increase in competition will promote, not defeat, the Congressional purposes expressed in the Bank Merger Act of 1960 and the antitrust laws.

ARGUMENT

I. Section 7 of the Clayton Act is Not Applicable Because the Proposed Merger Will Not Involve an Acquisition of Stock.

Appellant is seeking in this case to have this Court do what Congress has repeatedly refused to do —apply the Clayton Act to bank mergers. The plain meaning of section 7 of the Act, the settled interpretation of that language by this Court and the repeated manifestations of Congressional intent forbid that result.

Section 7 of the Clayton Act as originally enacted in 1914 applied only to acquisitions of "stock or other share capital." When this section was amended by the Act of December 29, 1950, 64 Stat. 1125, 15 U.S.C. § 18, to extend its application to acquisitions of assets, the extension applied only to corporations "subject to the jurisdiction of the Federal Trade Commission." Banks are not subject to the jurisdiction of the Federal Trade Commission* so that, as appellant admits (Appellant's Brief, p. 74), section 7 applies to the proposed merger only if it involves an acquisition of stock as that term is used in the Act. That is not the case here.

A merger of corporations does not involve an acquisition by the resulting corporation of stock of any of the corporations participating in the merger.

* Federal Trade Commission Act, § 5(a)(6), 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(6); Clayton Act, § 11, 38 Stat. 734, as amended, 15 U.S.C. § 21.

This Court so ruled in *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission*, 291 U.S. 587 (1934), which involved the question whether the language here invoked by appellant applied to a statutory merger under a state law substantially the same as section 215 of the national banking laws (Appendix, p. 82). under which the proposed merger will take place. It was said in that case:

> "The statute does not forbid the acquirement of property, or the merger of corporations pursuant to state laws, nor does it provide any machinery for compelling a divestiture of assets acquired by purchase or otherwise, or the distribution of physical property brought into a single ownership by merger." (291 U.S. at 595).
>
> "If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any antitrust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other than those found in the Clayton Act." (291 U.S. at 599).

That decision was by a divided Court but the dissenting opinion agreed that "It is true that the Clayton Act does not forbid corporate mergers * * *." (291 U.S. at 600).

Appellant seeks to explain away this Court's interpretation of the stock acquisition clause of section 7 by saying that it should be "limited by its context" (Appellant's Brief, p. 73, fn. 56). But even in its con-

text the opinion in *Arrow-Hart* has been recognized as confirming the plain meaning of section 7 that the stock acquisition clause does not cover corporate mergers. *Brown Shoe Co. v. United States*, 370 U.S. 294, 313 (1962); *United States v. Celanese Corp.*, 91 F. Supp. 14 (S.D.N.Y. 1950); *Report of the Attorney General's National Committee to Study the Antitrust Laws* 115-116 (1955).* The very fact of the limited scope of the original section is what led to the extension of the statute by the 1950 amendment to cover acquisitions of assets by corporations subject to the jurisdiction of the Federal Trade Commission. H. Rep. No. 1191, 81st Cong., 1st Sess. 5, 11-12 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950); *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962).

Appellant's argument ignores not only this background of the settled interpretation of the stock acquisition clause of section 7 but also the recognized legal effect under applicable law of the transaction proposed by appellees. Under the national banking statutes the only transfer which will occur in the proposed merger will be the transfer by operation of law

* Appellant refers on pages 19 and 79 of its brief to this Court's summary of the government's complaint in *Brown Shoe Co. v. United States*, 370 U.S. 294, 296 (1962). While the complaint alleged in paragraph 15 that Brown would acquire the stock of Kinney, this was denied in the answer. The point received no further attention since Brown was subject to the jurisdiction of the Federal Trade Commission and therefore clearly subject to section 7. Appellant admits in a footnote that the question "was not raised or argued."

of the assets of Girard to the resulting bank. 73 Stat. 462. 12 U.S.C. § 215(e) (Supp. II) (Appendix, p. 82); *Ex parte Worcester County National Bank*, 279 U.S. 347, 360 (1929); *United States* v. *Seattle-First National Bank*, 321 U.S. 583, 587-589 (1944). Since the corporate existence of Girard is automatically merged into and continued in the resulting bank, the shares of stock owned by the shareholders of Girard will not be acquired or transferred but will automatically be converted into the number of shares of stock of the resulting bank stipulated in the Agreement of Consolidation with appropriate adjustments for fractional shares. The section of the Agreement (GX 119, R. 2721-2724) dealing with the exchange of certificates evidencing the shares of the resulting bank into which the Girard shares will have been converted merely provides the mechanics for handling the certificates in order to reflect this result.*

There are many differences between an acquisition of stock and a merger. For example, a merger such as appellees' may be effected upon the affirmative vote of the holders of only two-thirds of the outstanding stock of each bank. 12 U.S.C. § 215; but if PNB were acquiring all of the Girard stock each Girard shareholder could decide for himself whether to transfer his shares. A merger requires public notice whereas

* As pointed out by the district court (R. 3643-3645), the Agreement was expressly made pursuant to the terms of section 215 of the national banking laws and thus there is no basis for suggesting that the Agreement, even if it could do so, would achieve a result different from that provided by section 215(e) of such laws.

stock can be acquired privately. A shareholder dissenting from a merger has the right to receive the appraised value of his shares, 12 U.S.C. § 215, whereas no shareholder has a comparable right in an acquisition of stock. Furthermore the corporate existence of a merged company is terminated by a merger, but remains unaffected by an acquisition of stock. In sum, the merger of appellees has none of the characteristics of an acquisition of stock within the meaning of section 7 or the fundamentals of corporation law.

Appellant also argues that a merger is different from a "normal" acquisition of assets for cash because the latter does not involve a continuity of interest by the shareholders of both corporations.* It then argues that this continuity of interest "must have appeared the primary threat to competition when the first section 7 was passed in 1914" (Appellant's Brief, p. 76). This argument ignores the fact that a purchase of stock for cash, which is clearly covered by section 7, also extinguishes the interest of the old stockholders, and that an acquisition of assets in exchange for stock involves a continuity of interest. More importantly, the argument misrepresents the legislative purpose in enacting section 7. As this Court recently stated in *Brown Shoe Co. v. United States*,

* Appellant says that the district court determined that the merger involved an asset acquisition (Appellant's Brief, p. 12). Actually it determined merely that the merger was not within section 7 because it did not involve a stock acquisition (R. 3644).

370 U.S. 294, 313-314 (1962), in reviewing the legislative history of the section:

> "The possibility of asset acquisition was discussed, but was not considered important to an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock."

Nor does the 1950 amendment to section 7 lend any support to appellant's argument, for banks were excluded from the extension of the Act to acquisitions of assets. In fact, following the 1950 amendment, numerous bills were introduced to extend section 7 to cover bank mergers.* These bills were not passed. Instead, Congress passed the Bank Merger Act of 1960, 74 Stat. 129, 12 U.S.C. § 1828(c) (Supp. II), which vested the authority to pass upon bank mergers in the federal banking agencies and required those agencies to consider the competitive factor along with six banking factors in determining whether a merger would be in the public interest.

Appellant admits that the legislative history of the Bank Merger Act shows a recognition by the Department of Justice and the Congressional committees that section 7 does not apply to bank mergers (Appellant's Brief, p. 72) but now tries to explain away

---

* These bills are summarized in Funk, *Antitrust Legislation Affecting Bank Mergers,* 75 Banking L. J. 369 (1958). See also Wemple & Cutler, *The Federal Bank Merger Law and the Antitrust Laws,* XVI Bus. Law. 994 (1961).

this fact by stating that these views were "not directly involved." This has not heretofore been the considered opinion of the Department of Justice but is one that has been conceived for the purposes of this case. Thus, appellant's present contention that a bank merger is subject to the Clayton Act is in direct conflict with the proposals for legislation made by Attorneys General for years prior to the enactment of the Bank Merger Act of 1960. Repeatedly they stated to Congress that section 7 does not apply to bank mergers.* For example, Attorney General Brownell, speaking of bank mergers, told the Senate Committee on Banking and Currency (Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957, 85th Cong., 1st Sess., Part 2 at 1030 (1957)):

> "On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by section 7 as amended in 1950."

---

* Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957, 85th Cong., 1st Sess., Part 2 at 1030, 1033 (1957); Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., Ser. 2 at 13, 49, 72 (1957); Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, Part 1 at 244, 266 (1955); Hearings on S. 3911 Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. at 61, 66 (1956); Hearings Pursuant to S. Res. 231 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. at 182 (1958); Hearings on S. 1062 Before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. at 9 (1959).

The inapplicability of section 7 to bank mergers was not only a representation made to Congress by the Department of Justice but was also recognized by it as a basis for the conduct of its duties. In passing upon an application for informal clearance of a bank merger in 1955, the Department stated (Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, Part 3 at 2141 (1955)):

> "After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act. For this reason this Department does not presently plan to take any action on this matter."

The fact that section 7 does not apply to bank mergers was a principal reason for the enactment of the Bank Merger Act. Thus the Report of the House Committee on Banking and Currency, under the heading "Need for Improved Controls Over Bank Mergers," concluded:

> "The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help." H. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960); see also p. 9 of the Report.

The Senate Report similarly states:

"Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they

are exempt from section 7 of the Clayton Act. (Stock acquisitions by bank holding companies, as distinguished from mergers and consolidations, are subject to both the Bank Holding Company Act of 1956 and sec. 7 of the Clayton Act.)" S. Rep. No. 196, 86th Cong., 1st Sess. 1-2 (1959).

"In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section, in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected)." *Id.* at 5.

This was also recognized by Representative Spence, Chairman of the House Committee on Banking and Currency, when he said during debate on the bill:

> "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong. Rec. 7257 (1960).*

The exclusion of bank mergers from the prohibitions of section 7 is no mere "otherwise-wholly-irrational distinction" (Appellant's Brief, p. 77) but

* Similar statements appear throughout the legislative debates. See 105 Cong. Rec. 8076 (Sen. Robertson), 8128 (Sen. Clark), 8130 (Sens. Sparkman and Javits) (1959); 106 Cong. Rec. 9711-12 (Sen. Fulbright), 9715 (Sen. Johnson) (1960).

is rather the result of a deliberate legislative policy that banks cannot be governed by the same antitrust rules as those governing industrial and commercial corporations. As Senator Robertson, chairman of the Senate Committee on Banking and Currency, stated during the debate on the Bank Merger Act:

> "The significance of the banking system to the monetary and fiscal policies of the Government, to the businesses and individuals who depend on bank loans for growth and development, and to depositors who must have confidence in the security of their deposits, is too important to permit unrestricted competition.
>
> "In the opinion of the committee it is impossible to subject bank mergers to the simple rule of section 7 of the Clayton Act. Under that act, a merger would be barred if it might tend substantially to lessen competition, regardless of the effects on the public interest." 105 Cong. Rec. 8076 (1959).

See also S. Rep. No. 196, 86th Cong., 1st Sess. 19-20 (1959).

Federal regulation of banking began long before the passage of the Sherman Act, and in the year before the Clayton Act was passed Congress adopted the Federal Reserve Act, which provided extensive regulation for national banks and also for state banks which joined the Federal Reserve System. Following the disastrous period of bank failures in the late 1920's and early 1930's, the Federal Deposit Insurance Act was passed and the Federal Reserve Act was

amended to restrict further the freedom of action of banks. Under the power vested in the federal banking agencies by these various acts, the agencies have exercised stringent supervisory authority over banks, leading one commentator to describe this system of regulation as more intensive than the regulation of any other industry. 1 Davis, *Administrative Law Treatise* § 4.04.

This scheme of federal regulation in the banking field reflects the Congressional policy that free competition among banks must be subordinated to the preservation of a sound banking structure. As Senator Fulbright, one of the sponsors of the Bank Merger Act, stated during the debate on that bill:

> "Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.
>
> "The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand. The 1950 amendment to section 7 of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from section 7 of the Clayton Act." 106 Cong. Rec. 9711 (1960).

"It is this distinction between banking and other business which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies to other mergers." *Id.* at 9712.

In adopting the Bank Merger Act of 1960 Congress decisively rejected the proposals to subject bank mergers to section 7. By so doing it reaffirmed the recognized and settled interpretation of the statute as its legislative will.* What appellant asks this Court to do, therefore, is not merely to legislate but also to create an antitrust prohibition which Congress has expressly refused to enact.

Although the district court concluded that section 7 is not applicable to this merger, it nonetheless applied the standards of that section in order to resolve

---

* This Court recently emphasized that it would not disturb prior decisions where Congress had adopted regulatory legislation with specific reference to those prior decisions. The Court said:

> "Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned." *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 458 (1962).

An example of the effect on the Congressional scheme of regulation of bank mergers which would result from a ruling that they are within the scope of the Clayton Act is found in the expansion of the powers of the Federal Reserve Board which would be a consequence of such ruling. Under the Bank Merger Act the Comptroller of the Currency approved this merger and the Federal Reserve Board had merely an advisory function. If bank mergers such as this constitute stock acquisitions, the Federal Reserve Board would also have authority under Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. § 21, to set aside the merger.

all questions expeditiously and found that the proposed merger would not substantially lessen competition or tend to create a monopoly (R. 3646, 3668). Appellant's factual argument in this Court is primarily based upon an alleged violation of section 1 of the Sherman Act, and therefore the balance of appellees' Argument will be similarly restricted. However, virtually everything which follows hereafter and which demonstrates that there has been no violation of section 1 of the Sherman Act is applicable to the standards of the Clayton Act.

II. THE EVIDENCE AFFIRMATIVELY SHOWS THAT THE PROPOSED MERGER WILL NOT RESULT IN AN UNREASONABLE RESTRAINT OF TRADE WITHIN THE BAN OF SECTION 1 OF THE SHERMAN ACT.

The granting of an injunction under the Sherman Act must be governed by the same high standards of proof applicable in other cases. Chief Justice Hughes stated in *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 377 (1933):

> "The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be 'a definite factual showing of illegality.'"

See also *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

In this case appellant has been forced to abandon as worthless the testimony of its witnesses* and now

* The district court said the theories of appellant's principal witnesses "were completely destroyed on cross-examination" (R. 3634).

bases its prayer for injunction on inferences derived from statistics, inferences which were flatly negated by the testimony of qualified bankers, businessmen and economists. Appellant's evidence does not meet the test of "a definite factual showing of illegality", and the district court so found (R. 3662-3663).

A. COMPETITION IN COMMERCIAL BANKING IS FUNDAMENTALLY DIFFERENT FROM COMPETITION AMONG INDUSTRIAL AND COMMERCIAL BUSINESSES.

The effects of a merger under the antitrust laws must be examined in the context of the unique conditions of the particular business. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321-322 (1962); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-528 (1948). Such an approach is of special importance in this case, the first in which this Court has had to review the application of the antitrust laws to a bank merger. The district court recognized, as has Congress (Appendix, pp. 85, 87, 91, 96-97, 106), that commercial banking is fundamentally different from industrial and commercial businesses (R. 3635; Fdg. 9a, R. 3490; R. 1522, 1977-1979). Appellant seeks to obscure this by asserting that such a distinction would exclude banking from the antitrust laws or weaken or modify their effect on banking (Appellant's Brief, pp. 15, 25-26). What the district court found was merely that in measuring the effect of the merger on competition among banks, the special nature of that competition must be recognized and given effect. It

accordingly made detailed findings with respect to the character of the competition which exists among commercial banks (Fdgs. 9a-43a, R. 3490-3493).

The unique characteristics of competition among commercial banks arise from the nature of commercial banking and the effect on it of governmental regulation. Banks are dependent for the bulk of the funds with which they operate on the will, or whim, of their depositors. They do not own the funds they lend, they owe them (R. 1977, 1522). No matter how large or small a bank may be it cannot prevent its depositors from withdrawing all of their demand deposits at any time (Fdg. 27a, R. 3492; R. 1562, 1977-1978). As for its borrowers, the money market and the forces that control interest rates are so vast that no bank can raise the interest rates it charges on loans above current levels without losing its borrowers to other banks (Fdg. 33a, R. 3492; R. 938, 1555-1556). Stated in other terms, banks have no power to control the supply of the raw material they use nor to dominate their customers, and an almost negligible ability to vary the prices they pay or charge. For the same reasons one bank cannot dominate others.

The type of business a bank may do is limited by governmental restrictions on the nature, amount, volume and purpose of the loans it may make, by regulations requiring that a bank's investments be of a certain high rating, by strict requirements of liquidity of assets enforced by bank examiners, and by the dictates of sound banking practice on ratios of capital,

loans and deposits, which the periodic examination of banks by federal and state authorities assures (Fdgs. 14a, 22a-25a, R. 3490-3492; R. 1523-1528, 1547-1548, 1551, 1943-1945). A bank's profits are limited not only by these factors but also by the narrow range of interest rates it may charge on loans within the legal and practical maximum fixed by usury laws and a fluctuating minimum set by the money market in response to forces over which only the government has any control (Fdgs. 15a-18a, 26a, R. 3490-3492; R. 938, 1364-1369, 1543-1546, 1552-1555, 1941-1942). Accordingly, customers with the highest credit rating may demand and obtain the minimum, or "prime rate", whatever it may be. A bank's power to attract the deposits it must have to do its business is restricted by governmental regulation of the interest it may or may not pay on deposits (Fdg. 13a, R. 3490; R. 1366, 1537). As a result, competition among commercial banks is narrowly limited. It consists primarily of convenience and quality of service, and involves "price" competition only to a minor degree (Fdgs. 12a, 26a, 28a-29a, 32a-37a, R. 3490, 3492-3493; R. 1364-1365, 1942). This limitation of competition is not merely the result, it is the very purpose of the extensive governmental regulation of commercial banks (Fdg. 11a, R. 3490; R. 1365). The public interest in the soundness of the banking system and the protection of depositors requires that commercial banking not be subjected to those competitive pressures which, under our economic system, are relied on to determine the course of indus-

trial and commercial businesses (Appendix, pp. 86-88, 107, 108).

The effect of governmental regulation on banking competition was recognized by Congress in its consideration of the Bank Merger Act. The House Report states, "banking is a licensed and strictly supervised industry that offers problems acutely different from other types of business"; and the Senate Report similarly declares, "it is impossible to require unrestricted competition in the field of banking and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulations and not vested with a public interest." H. Rep. No. 1416, 86th Cong., 2d Sess. 9 (1960); S. Rep. No. 196, 86th Cong., 1st Sess. 16 (1959).

Appellant has failed throughout this case to appreciate the differences between competition in commercial banking and that existing in other businesses. Wholly disregarding these differences it indiscriminately uses percentages and theories from cases involving other businesses and brushes to one side the testimony of persons familiar with commercial banking that these percentages and theories do not support the conclusions which appellant seeks to draw from them. Such an approach was expressly disapproved by this Court in *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86, 98 (1953), as follows:

> "What may substantially lessen competition in those areas where competition is the main

reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry."

By employing such extravagant terms as "huge banks," "immediate dominance," "concentration of banking power," "dominant giant" (Appellant's Brief, pp. 16, 17, 71, 82) appellant seeks to distract attention not only from its use of inapplicable tests as a basis for its conclusions but also from the total absence of evidence supporting any of its conclusions. The use of such terms cannot obscure the fact that the record shows the inability of a large bank to affect the business done by smaller banks, to suppress or stifle competition, to limit the freedom of action of other banks, to control the activities of its customers, to fix the price of money or to create a monopoly.

B. THE "MARKET SHARES" WHICH ARE THE PRINCIPAL BASIS OF APPELLANT'S CASE ARE SO DISTORTED AS TO BE MEANINGLESS.

Market shares are only one of the factors which must be considered in determining the effect of a merger on competition. In this case, they form the principal thrust of appellant's attack. Thus, it is important to appreciate at the outset that appellant has freely used selected statistics which inflate the appar-

ent size of appellees' shares of local business. Actually the percentages offered by appellant do not establish a basis for determining appellees' share of any market.

Any attempt to test commercial banking against traditional antitrust concepts must start with facts that are basic to banking. The concepts of geographic market and product market cannot be applied in the customary way to commercial banking. "Money knows no home;" it goes where the return is greatest (R. 1535-1536). It is impossible to place useful geographic boundaries around such broad categories as "loans" or "deposits" or "trust business." Only when these terms are related to each of the many different types of customer can any geographic division begin to have meaning. Large borrowers and large depositors find it worthwhile to go long distances, even outside the country, to obtain the best terms. As to some the market is worldwide and as to many others the market is at least nationwide.* At the other end of the scale is the person of modest means who is unable, nor is it worth his while, to do his banking more than a short distance from home. All this is necessary to an understanding of the significance of the district court's finding that the key to a study of competition in banking is the number and location of alternative choices available to any customer (R. 3653).

* The statement on page 35 of appellant's brief that "banking customers within a given area do not readily use the services of comparatively distant banks" is not supported by the record. See fn., page 10, *supra*.

Only when statistics reflect those facts can they have any meaning in a banking antitrust case. See Appendix, pages 99-100.

Some knowledge of the volume and kind of business done in a given area by all banks, wherever located, is essential to an insight into the level of competition in banking in that area. Not one clue to this can be found in appellant's statistics, and for that reason they are valueless in this case.

Although the evidence is undisputed that appellees compete for a significant volume of business throughout the northeastern United States and, with respect to some of their services, throughout the entire country, appellant argues that the market should be narrowed to the small area consisting of Philadelphia County and the three contiguous Pennsylvania counties of Bucks, Delaware and Montgomery. This excludes even the three contiguous New Jersey counties and the other areas, both within and outside Pennsylvania, which make up the economic and industrial complex known as the "Delaware Valley".* Moreover, in computing appellees' alleged share of the banking business in this area appellant has included, as though it were derived therefrom, all of appellees' business, wherever obtained. In addition, appellant has included in its computations only the business of the commercial banks with head offices physically located in the four-county area despite the undisputed evidence that many other banks from

* This area is shown on the map appearing on page 11, *supra*.

cities throughout the country solicit and obtain substantial business there.

1. *The four-county area proposed as the relevant market by appellant does not correspond to the economic or commercial realities of commercial banking in the Philadelphia area.*

After giving recognition to the intricate and complex overlapping of numerous markets in the field of banking (Fdgs. 44a-53a; R. 3494-3496, 3652-3653), the district court found as a fact that the geographic market in which the proposed merger should be tested is far larger than the four Pennsylvania counties to which appellant restricted its evidence (Fdg. 53a, R. 3496, 3652-3653). The court reached this conclusion on the basis of extensive testimony that competition for commercial banking services must be measured by the location of alternative sources from which a banking customer can obtain such services (Fdgs. 44a, 46a, R. 3494; R. 1371-1374).

A relevant geographic market must "both 'correspond to the commercial realities' of the industry and be economically significant." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336-337 (1962). The nature of commercial banking permits wide mobility for banks and their customers. The transportation cost of money is zero. Loans can be arranged by telephone, deposits can be made by mail (R. 2065, 1376). There is nothing for a banking customer to try on or look at nor is there any problem of spoilage. A striking

illustration of this mobility is the number of representatives of the large banks in New York and elsewhere who are in Philadelphia continuously soliciting business,* and conversely the number of customers located in the Philadelphia area who go to New York or other cities when their banking needs cannot be met by banks located in Philadelphia (R. 1609-1625, 2152, 2254-2256). As the district court said (R. 3653):

> "It was very surprising to learn at the trial of this case that not only New York banks solicit and receive substantial business from customers within the four-county area, but also large banks from all the larger cities in the nation do likewise."

Appellant ignores the economics of the Philadelphia area. The city stands at the center of the "Delaware Valley," an area much larger than the four counties, bounded by Trenton on the north and Wilmington on the south. The standard census area includes not only the four counties but also Chester, Camden, Burlington and Gloucester Counties and the evidence establishes that this is properly considered the metropolitan area from the standpoint of the economy of the region (R. 2273-2276).

Bank customers are not restricted by political boundaries in seeking banking accommodation. For example, many individuals working in Philadelphia live in other Pennsylvania counties or in New Jersey

* See fn., page 10, *supra*, particularly the testimony at R. 1626-1628, 2025-2028.

and consequently have available banking choices in each area. Similarly, individuals living in Pennsylvania work in Trenton, New Jersey, or in Wilmington, Delaware, and deal with banks in those cities (R. 1633-1634). This interrelationship of the entire area is even more significant for industrial and business customers in view of the role which Philadelphia plays in providing essential services for the area.

Appellant seeks to overturn the district court's findings of fact by pointing to the limitation of appellees' offices to the four-county area under Pennsylvania law,* to selected statistics on the source of certain types of appellees' business, to but one of the several reasons why appellees open branches, and to the advisory opinions of the Federal Reserve Board and Federal Deposit Insurance Corporation (Appellant's Brief, pp. 34-37).† None of these shows the district court's conclusion to be erroneous.

The suggestion that the four-county area must be the relevant geographic market because appellees have opened branch offices to follow their customers and because such offices are located only in the four-county area, is refuted by the mobility of bank customers

* In Pennsylvania a bank may open branches only in the county in which its principal office is located or in a county contiguous to it in the same state.

† Appellant erroneously states (Appellant's Brief, p. 10) that the FDIC considered appellees to be in competition principally with banks in the four-county area, when in fact the report explicitly recognized that appellees are "active competitors" of banks in a far broader area, including New York and Pittsburgh (GX 163, R. 2848-2850).

and the existence of numerous banking alternatives outside the area.

Appellant's use of statistics emphasizing the physical location of appellees' customers is likewise misleading.* In an effort to show a strictly local market, appellant separates commercial banking into its component parts in order to emphasize those banking services which are local in nature, such as savings deposits and loans to individuals. If the market is to be determined on the basis of particular banking services, it is at least equally relevant that 43% of appellees' commercial and industrial loans, a major source of a bank's income, are made to customers outside the four-county area (DX 63, III, R. 3286). Furthermore, although appellant breaks down commercial banking to give emphasis to the local services rendered by appellees, it ignores the intense competition offered appellees by other financial institutions in these same services. See Appendix, pages 100-101. For instance, appellees' combined share of all time and savings accounts in all institutions in the four-county area is less than 6% (DX 32, R. 3168), their share of real estate loans is less than 3% (DX 65, R. 3287) and

* The language, "primary area," used on page 34 of appellant's brief to describe the significance of the four-county area for appellees' business, is almost identical with language used in most of the findings requested by appellant referred to in the table on that page. All of these requests were refused by the district court, which approved the statistical tables that accompanied these findings but said that "the conclusions therefrom which the plaintiff asked the court to draw are denied, and the remaining parts are refused as stated" (R. 3664).

the number of their non-bank competitors making loans is in the hundreds (DX 65, R. 3288-3291; DX 66, IV, R. 3295-3297).

More importantly, if one considers the locations of the customers' alternative choices, which the district court found to be the proper test, the most relevant statistics are that 68% in amount of appellees' commercial and industrial loans are made to, and 64% of their business demand deposits are received from, customers with known alternative choices outside the four-county area (Fdg. 52(e)a, R. 3496; DX 43, R. 3185)*. In these circumstances the use of the four-county area as a geographic market to test the competitive effect of the merger is totally unrealistic.

Finally, appellant's reference to the advisory opinion of the Federal Reserve Board is one of the numerous instances of appellant's reliance (Appellant's Brief, pp. 15, 37, 61, 63) on that board's opinion because of the lack of any affirmative evidence in this case which supports appellant's views. The Board's opinion was not supported by any witness, and was based on material which was not made part of this record and therefore could not be tested at the trial. It is thus entitled to no weight. See *United States v. International Harvester Co.*, 274 U.S. 693, 703 (1927). As an opinion announced prior to this suit, it

* In view of these undisputed facts, appellant's statement (Appellant's Brief, p. 38) that only appellees' "few largest" customers "may" have choices outside the four-county area is insupportable, to say the least.

was necessarily formed without the benefit of the facts developed in the course of the trial. It was upon the basis of those facts that the district court reached its conclusion.

2. *Appellant's statistics do not separate the business of local banks done outside the four-county area from that done within it.*

Appellant's constant repetition of its inflated percentage figures cannot hide the fact that these figures do not represent appellees' shares of the banking business in the four-county area. Appellant's percentages are based upon all of the business done by appellees throughout the country in spite of the fact that the record shows the amount of business done by appellees in the four-county area alone. No figures were introduced showing the amount of business done within the four-county area by the other banks located there. This failure so to limit the percentages is no minor imperfection. For example, appellant claims that appellees' "market share" will be 34% of all loans and 36% of all deposits (Appellant's Brief, p. 56). However, 44% of all of appellees' loans are made outside the four-county area (DX 30, R. 3167). If this amount is excluded from appellant's figures, the percentage drops from 34% to 22%. Similarly, if recognition is given to the fact that 32% of appellees' deposits are received from outside the four-county area, the percentage drops from 36% to 28% (DX 30, R. 3165-3166). Even these figures are greatly overstated and therefore valueless because they give no effect to the substantial volume of business done within the four-county area by banks outside it.

There is no justification for appellant's assumption that appellees' share of the business done in the four-county area by the banks located there is the same or even roughly the same as their share of such banks' total business done everywhere. On the contrary, there are many indications in the record that appellees do a far greater percentage of their business outside the four-county area than most of the other banks located within it. For example, approximately 60% in amount of appellees' commercial and industrial loans are loans of $500,000 or more, of which one-half are to borrowers located outside the four counties (DX 30, R. 3167). Of all their commercial and industrial loans 43% are made to outside borrowers *(Ibid.)*. The record indicates that most of the other banks in the four-county area, being smaller banks, do the largest percentage of their business in that area and that most of their loans are in amounts smaller than those of appellees (R. 1231-1232, 1235-1236, 1794-1795, 1909-1910, 1921-1923, 1927, 2082). Thus a comparison of the total business of those banks with the total business of appellees, which do so much business outside the four counties and make the larger loans, is necessarily distorted.

3. *Appellant ignores all of the competition in the four-county area furnished by competitors located elsewhere.*

The inaccuracy of appellant's figures is further magnified by a failure to reflect in the statistics any figures for any banks except those with head offices in

the four-county area. Thus there is nothing to suggest the total volume of banking business done within the area, so that the percentage of that business done by PNB or Girard cannot even be approximated (Fdgs. 56a, 57a, R. 3496-3497).

Substantial business done in an area by competitors located outside it must be included in analyzing a market. *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 502-503, 530 (1948); *Erie Sand & Gravel Co.* v. *Federal Trade Commission,* 291 F.2d 279 (3d Cir. 1961). Cf. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961). Appellant's brief would lead this Court to believe that the only competition for banking services in the four-county area is furnished by banks with headquarters in that area. The record is replete, however, with testimony as to the active and successful solicitation of business in the four-county area by banks located elsewhere (see fn., page 10, *supra*).* Appellant gives no recognition to

* In its brief in opposition to appellees' motions to affirm (pp. 8-9), appellant labelled this testimony "speculation" and pointed to a 1955 Federal Reserve study to show that New York banks had "only" $113,000,000 in commercial and industrial loans to borrowers located in Philadelphia. The information for this study was provided by the New York banks on a confidential basis, but when appellees attempted to bring it up to date and to include all categories of bank services, appellant refused to permit its use in evidence on a similarly confidential basis (R. 18-39). The figures in the 1955 study show not only that New York banks had $113,000,000 in such loans in Philadelphia alone, but also that they had $337,000,000 in the Third Federal Reserve District, which is almost as much as appellees together had in 1960 (DX 1, R. 2992, 2997-2998; DX 63, III, R. 3286).

any of these competing banks in its statement that the merger "would reduce to four and three, respectively, the number of competitors for loans up to \$2,500,000 and \$5,000,000" (Appellant's Brief, p. 56). In view of the record in this case it is preposterous to suggest that banks in New York and other large cities should not be numbered among the competitors for business of that size in Philadelphia.*

The statistical invalidity of appellant's figures led the district court to make the following finding (Fdg. 56a, R. 3496):

> "Plaintiff has introduced no evidence bearing on defendants' proportion of the entire banking business done within the four-county area by all banks deriving business from that area, in any category of business."

C. THE EVIDENCE ESTABLISHES THAT THE MERGER WILL NOT HAVE AN ADVERSE EFFECT ON BANKING COMPETITION OR ON COMPETITORS OR CUSTOMERS OF APPELLEES IN THE PHILADELPHIA AREA.

The preceding section of this brief was directed to the fundamentally misleading character of appellant's statistics and their inadequacy as a support for appellant's conclusions. These statistics were discussed at length, not because appellees deem them significant,

* If in *Columbia Steel* appellant had excluded the business done in the area by outside firms, the "market share" of the acquired corporation would have risen from 10.6% to 16.8% and the acquiring corporation would not have been included in the market at all. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 513 (1948).

but because appellant, having failed in its efforts to produce a single informed witness who would say that the proposed merger would cause any restraint of trade or commerce,* was forced to rely on statistics alone as a basis for the inferences on which its case is founded. The important evidence in this case, however, and that which will now be discussed, is the testimony of bankers, businessmen, and economists, all familiar with banking and banking needs in the Philadelphia area, who uniformly said that the merger would produce no restraint. The testimony of those familiar with conditions elsewhere throughout the country likewise showed that the existence of a bank as large as the merged bank has not produced such a restraint in any market and would be totally unable to do so in an area such as Philadelphia. On the contrary, the record establishes that the effect of the merger will be to increase and sharpen competition and to benefit the community as a whole.

1. *The elimination of competition between appellees does not of itself constitute an unreasonable restraint of trade.*

The elimination of competition between Girard and PNB, of which appellant tries to make so much, would be significant only if this might in fact have some adverse effect on competing banks or on the

* Although 359 pages of the printed record are occupied by the testimony of appellant's witnesses offered as experts, Professors Smith and Goodman, none of it is cited to support appellant's position.

ability of the public to obtain ample and satisfactory banking accommodation. No qualified witness could be produced by appellant who would testify that either result would be brought about by the merger, and appellant is forced to ask this Court to infer it from the mere fact that the merger will make one bank out of two. But a merger of two competitors has never been prohibited as a *per se* offense under either the Sherman Act, *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), or the amended Clayton Act, *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). In fact, in each of these cases this Court found that the validity of a merger must be measured by its "effect on competition generally in an economically significant market," 370 U.S. at 335. See 334 U.S. at 527-528.

The resources, facilities and personnel of both Girard and PNB will continue to be available to the public in the merged bank, as will those of the other 40 banks of the four-county area, the 75 more in the ten-county area, and the many banks elsewhere.* The end of competition between Girard and PNB will in no way insulate these other banks from competition with the merged bank or free the merged bank from having to compete with them, or give it any power to control or restrain the actions of its competitors or their customers.

* The "hundreds of millions of dollars" of deposits in both appellees belonging to the same customers (Appellant's Brief, p. 41) involves only 400 such customers, most of whom are of the type whose banking choices are not limited to the Philadelphia area (GX 57, R. 2509-2511).

Despite the holdings of this Court in *Columbia Steel* and *Brown Shoe*, appellant continues to press its argument that the elimination of competition between appellees of itself constitutes a restraint of trade, relying on five cases relating to railroad combinations decided between 1904 and 1922. These cases were cited to this Court in *Columbia Steel* but the Court did not even stop to examine them because the factual situation was so dissimilar "that they furnish little guidance." 334 U.S. at 531.

Appellant misses the mark in its attempt (Appellant's Brief, p. 48) to find a similarity between commercial banks and railroads when this Court refused to find such a similarity between steel companies and railroads. An important element in these decisions was the monopoly power possessed by the transcontinental railroads and the anthracite carriers. This was stated clearly in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 327-328, 330-331, 363 (1904) and reiterated in the decisions which followed it. *United States* v. *Union Pacific R.R.*, 226 U.S. 61, 83, 88 (1912); *United States* v. *Reading Co.*, 253 U.S. 26, 47-48 (1920); *United States* v. *Lehigh Valley R.R.*, 254 U.S. 255, 269-270 (1920); *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 230-232 (1922). The last of these cases repudiates appellant's contention. The Court there said that the principle of these earlier cases "was broader than the mere effect upon existing competition between the two systems" (259 U.S. at 230). Furthermore, in the anthracite carrier cases, the

Court pointed to the extensive purchases of independent coal properties, to the combination among the competing carriers to defeat the construction of a new competing railroad, and to the agreement to eliminate the independent coal producers as competitors through restrictive contracts. *United States* v. *Reading Co.*, 253 U.S. 26, 45, 49-50 (1920); *United States* v. *Lehigh Valley R.R.*, 254 U.S. 255, 267-270 (1920). That these cases are totally dissimilar to the instant one is made clear by the abundance of evidence which supports the district court's finding that the merged bank could not possibly control the price and supply of bank credit because "entirely too much competition exists at all levels to permit such an occurrence" (R. 3658). They therefore provide no basis for appellant's argument that the ending of competition between appellees would in itself violate the Sherman Act.

Appellant's argument is inconsistent with the Congressional policy expressed in the Bank Merger Act (Appendix, pp. 84, 89, 95) and would make section 7 of the Clayton Act superfluous since that statute as construed by this Court in *Brown Shoe* would be less restrictive than the newly-suggested prohibitions of the Sherman Act proposed by appellant. This Court said that the standard of illegality set forth in section 7 "reflects a conscious avoidance of exclusively mathematical tests" (370 U.S. at 321, fn. 36). The Court emphasized that the Clayton Act's "concern was with probabilities, not certainties", thereby distinguishing it from other antitrust legislation, including the Sher-

man Act, which existed for "dealing with clear-cut menaces to competition" (370 U.S. at 323). The virtually mechanical prohibition of mergers under the Sherman Act which appellant suggests is not compatible with this interpretation of section 7 by the Court.

2. *The merged bank will not be able to dominate or have a competitive advantage over other Philadelphia area banks.*

The district court found on the basis of all the evidence that the increase in size of the merged bank "would not be sufficient for market domination" (R. 3658). Despite this finding appellant argues (Appellant's Brief, p. 59), without reference to the record, that the merged bank will be able to dominate its competitors and that the increase in size of the merged bank "will jeopardize the ability of smaller banks to retain or attract business" (Appellant's Brief, p. 63). These theories have no support in the record and are directly contrary to the affirmative testimony of the executives of seven smaller banks in the Philadelphia area, the very banks which appellant asserts will be jeopardized by the merger (R. 1795-1803, 1823-1829, 1874-1877, 1900-1907, 1925-1927, 2086-2087, 2252-2255). As to this the district court said:

> "This Court fails to see how any court, without some factual basis being laid therefor, could accede to [appellant's] request and this is all the more true in this particular case where experienced, substantial bankers throughout this entire area

have appeared in open court, subjected themselves to searching cross-examination, and have unanimously demonstrated that the proposed merger would not cause an undue concentration of banking, would not tend toward a monopoly, and definitely would increase the vigor of competition which the Congress of the United States from the passage of the Sherman Act down to the present date has, by law, attempted to foster." (R. 3666).

Appellant assumes that as a bank grows in size it somehow obtains an advantage over smaller competitors. Obviously larger size enables a bank to attract the business of larger borrowers, which it could not obtain if it were smaller. But large size gives a bank no advantage in seeking to attract the kind of banking business that is within the capacity of its smaller competitors (Fdg. 40a, R. 3493; R. 1237, 1377, 1824, 1866-1867, 1901-1903). This is one of the significant results which flow from the nature of commercial banking. The principal source of every commercial bank's funds is its deposits (Fdg. 27a, R. 3492). Since competition for deposits is largely limited to convenience, quality of service and personal relationships (Fdg. 37a, R. 3493), a large bank has no competitive advantage over a small bank in the attraction of deposits from persons who may be served by both. Indeed there was testimony in the case that the smaller bank has the advantage in these respects (R. 1892-1893). This is also true for loans.

There is no testimony, on which even appellant is willing to rely, that the proposed merger would adversely affect competition in commercial banking. Aside from a number of references to the record to support the statement that banks compete (Appellant's Brief, pp. 39-40) which appellees do not challenge, appellant is able to point to two items alone as lifting the supposed adverse effect of the merger from the realm of "speculation" (Appellant's Brief, pp. 41-42). These two items, which are all appellant can glean from thousands of pages of testimony and hundreds of exhibits, are nothing more than "recommendations" of working committees of appellees on two minor aspects of the future operations of the merged bank. There is no evidence that either of these recommendations were ever approved or adopted or will be followed by the merged bank as appellant asserts.*

The absence of any evidence that the merger will lessen banking competition, coupled with the positive testimony of every competent witness that the merger will increase it, is the heart of this case. The very fact that appellant, in the face of the unanimous opinion of witnesses acquainted with commercial banking in the Philadelphia area, bases virtually its entire case on the relative size of the merged bank, demonstrates appellant's total failure to appreciate the fundamental differences between commercial banking and indus-

* The exhibits which formed the sole basis of appellant's requested findings (Fdgs. 328, 349, R. 3403, 3407; GX 145, GX 143) were never explained or discussed by any witness nor printed in the record.

trial or commercial businesses. In the light of these differences it was incumbent upon appellant to offer at least some evidence to show the applicability of "size," "concentration," "history of mergers in the industry" and similar concepts which have been found pertinent in industrial and commercial fields. Appellant was unable to produce any such evidence.

The growth of commercial banks in the Philadelphia area in the past confirms the testimony that a larger bank has no advantage over its smaller competitors. The competitors of appellees who testified in this case pointed to the rapid growth of each new banking office and of a new bank which had been established within short distances of the offices of larger banks (R. 1822-1823, 1867-1869, 1922-1924, 2250-2252). The percentage growth of deposits of Delaware Valley banks during the past ten years likewise confirms these findings. Although PNB and Girard are the second and third largest banks, 107 of the 115 banks in the area have experienced in recent years a percentage deposit growth greater than that of either PNB or Girard (Fdgs. 109a-122a, R. 3504-3505; DX 18, R. 3060-3070).*

---

* The experience of smaller banks throughout the United States has been comparable. Even the officers of small banks in many parts of the country whom appellant brought to Philadelphia to testify against bank mergers in general admitted that their banks had no difficulty competing with large banks (R. 309-312, 483-484, 651-652, 810).

The percentages of the deposits held by the largest banks in the United States and in particular areas have generally decreased (Fdgs. 140a-142a, R. 3508; R. 1958-1972, 1980-1981; DX 46, R. 3193-3207; DX 48, R. 3244-3257).

All of the foregoing testimony and evidence led the district court to find:

> "Large commercial banks do not have a competitive advantage for business within the range of the resources of smaller banks. In that range, small banks are able to compete as effectively as large banks." (Fdg. 40a, R. 3493).

Moreover the merged bank would have no power to force other banks to raise service charges or interest rates on loans, or to lower rates of interest on deposits. If the merged bank increased its own charges or interest rates on loans above the going rates it would simply lose business to other banks, of which there are more than enough to absorb any business so lost. Nor would the merged bank have any power to affect the free choice of banks by depositors or borrowers, or affect the supply of money in the area or in any way impose its will on other banks or the public (Fdgs. 149a-154a, R. 3509-3510; R. 938-940, 1411-1412, 1731-1732, 1801-1802, 1827-1829, 1874-1877, 1905-1907, 1975-1980, 2029, 2253-2254).

3. *Appellant's contention that banking concentration in Philadelphia will be undue and dangerous is refuted by the evidence.*

Despite the express finding of the district court that "no dangerously potential concentration will result from this merger" (R. 3658), appellant argues that the proposed merger is part of a "dangerous trend toward concentration" in the four-county area

(Appellant's Brief, p. 55). Appellant emphasizes the fact that the number of commercial banks with head offices in the four-county area has diminished in the last 15 years, but ignores the increase in banking offices from 178 to 283 during the same period (GX 13(S), R. 2385). Appellant offered no evidence that the earlier number of banks was the proper number or that the present number is inadequate, and left untouched the question of the effect of this change on the banking business. There is no evidence to suggest that the greater number of banks in 1947 competed with one another more vigorously than the banks do today, or that banking customers in the Philadelphia area were better served then than now. In fact, all the evidence is to the contrary.

Witnesses with knowledge of the Philadelphia area uniformly testified that the reason for past mergers was the pressing need of customers for increased banking services which the existing small banks could not provide (R. 992-994, 1872-1873, 2259-2262, 1833-1838). This need arose from the movement of population and industry to the suburbs, the change in emphasis from wholesale banking serving large corporate customers to retail banking for smaller customers, the greater demand for services which this change placed on the smaller suburban banks, and the liberalization of branching restrictions to accommodate this need (Fdgs. 97a-107a, R. 3502-3503). Indeed the witnesses were emphatic in stating that such mergers, which improved the quality of banking services throughout

the area, have made banking competition far more vigorous today than it was fifteen years ago (Fdg. 107a, R. 3503; R. 994-995, 1237, 1633, 1794, 1824, 1923, 2251). The witnesses further testified that the proposed merger will similarly increase competition and will not affect the ability of other banks to compete effectively (R. 1400, 1412-1413, 1634-1636, 1795, 1825-1829, 1875-1877, 1903, 1925-1927, 1973-1974, 1979, 2252-2254).

Appellant's argument on the reduction in numbers is directly contrary to the statement at page 60 of its brief that "this mere counting of noses leaves out of sight the point of real significance, namely, the size and capacity for competition of the remaining banks." The FDIC reached a similar conclusion in one of the few available studies of banking competition and concentration:

> "No easy or simple answer can be given to the question of the extent to which bank competition has been affected by changes in the number of banks and in the relative position of banks since 1921. If there have been significant changes in the nature of competition among banks, or an appreciable reduction in the intensity of competition among them, the evidence of such changes must come from something other than an examination of changes in the number of banks and in their relative position." Annual Report of the FDIC for 1960 (DX 48, R. 3260).

With respect to the change in the relative positions of banks in the four-county area resulting from

the merger, appellant points to its calculation that the merged bank will hold more than 35% of the assets of the 41 banks in that area (Appellant's Brief, p. 56). This percentage, called "concentration" by appellant, is subject to the same major statistical infirmities as are appellant's "market shares". Moreover, concentration in banking, great or small, without evidence of its effect if any on competition, has no legal significance.* A violation of section 1 of the Sherman Act is not established merely by proof that a merger will bring together a certain percentage of banking resources within a particular area. See *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-528 (1948). Even in the more prohibitory standards of section 7 of the Clayton Act, Congress reflected "a conscious avoidance of exclusively mathematical tests." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321 fn. 36 (1962).

An examination of concentration in commercial banking in other cities of the United States, computed as appellant has computed it for the four-county area, discloses that in 190 of 224 cities with more than 50,000 population, the largest bank held 35% or more of the bank assets (DX 46, R. 3193-3207). The same is true for 78 of 110 cities with more than 100,000 population (DX 47, R. 3208; *supra*, p. 18), and for 18 of the 34 most populous metropolitan areas in states which,

* Among the banks in the national market with which appellees must compete for the business of their larger customers, the increase in concentration resulting from this merger will be negligible (DX 24, R. 3154).

like Pennsylvania, permit limited area branch banking (DX 55, R. 3266-3267).

There are hundreds of cities and even some states in which the largest bank holds a far greater proportion of bank assets than the merged bank will hold in Philadelphia. Appellant saw fit to call witnesses from small towns as far west as California to express their general displeasure with bank mergers (R. 3634). However, it failed to produce a single witness from any of those hundreds of cities to say that any restraint of trade existed there. Thus, there is no evidence to support appellant's contention that an even smaller concentration in Philadelphia would have an adverse effect on competition. On the other hand, appellees produced expert testimony that there is adequate banking competition in each of those cities which have greater concentration than there will be in Philadelphia after the merger (R. 1954, 1956). Whatever may be the effect of concentration in other industries, ratios alone in commercial banking do not furnish a reliable test of the power of banks to compete with one another. The FDIC reached the same conclusion in the study referred to above (DX 48, R. 3258), saying that ". . . there is no fixed relationship between changes in concentration and changes in competition."

Appellant's suggestion that this merger will force the other large banks located in Philadelphia to merge is without any support in the record. What appellant is really saying is that, while this merger will not

restrain trade, some future merger will do so. However, such a merger will first have to be approved under the Bank Merger Act and appellant will be given notice of such a merger with full opportunity to contest it. As the district court stated (R. 3662):

> "Every future merger in the four-county area will be subject to the close scrutiny of the appropriate state and federal agency. At some point any trend, if discernible in the future, will be checked."

The district court found, on the basis of the evidence offered by appellees, that the 41 banks of the four-county area after the merger will provide a more than adequate number of alternative sources of credit for small and medium size borrowers, particularly in the light of the fact that a prospective borrower turned down by three banks would probably be rejected on credit grounds by any bank (R. 3660; R. 1398, 1716). The other major class of bank customer, the depositor, can obviously go anywhere. The availability to larger customers of the increased lending limit and resources of the merged bank far outweighs a reduction in the number of local banks by one, especially since none of those banks prior to the merger could meet many of their needs. The extravagant statement on page 72 of appellant's brief, that "thousands of existing customers" would be injured by the supposed "restraint of competition" is wholly without justification. It is particularly significant that not one of these "thousands" could be found to challenge the affirma-

tive evidence of appellees' witnesses that existing customers would be benefited by the merger (Fdgs. 190a-195a, 199a-201a, R. 3516-3518).

D. THE MERGED BANK WILL BE BETTER ABLE TO SERVE THE CONVENIENCE AND NEEDS OF THE PHILADELPHIA COMMUNITY AND WILL INCREASE REGIONAL AND NATIONAL COMPETITION.

The proposed merger "is not motivated by an intent or purpose to restrain trade or adversely affect competition" (Fdg. 170a, R. 3512). Its purpose is to prevent the further loss of banking business by appellees to the larger banks from other cities which compete in the Philadelphia area and to provide more adequate banking service to local enterprises (Fdgs. 173a-185a, R. 3513-3515; R. 931-937, 1602-1608).

The district court made detailed findings on the need for the larger bank and the benefits to the community in having such a bank (Fdgs. 173a-207a, R. 3513-3518). In its decision the court stated that it was convinced the merger meets the test of reasonableness under section 1 of the Sherman Act (R. 3663) and concluded (R. 3667):

> "That it will benefit the city and area has been established clearly by a fair preponderance of the evidence, as has been set forth in the Findings of Fact of the defendants previously affirmed."

Appellant's argument that these findings are irrelevant in determining whether there will be a viola-

tion of section 1 is directly contradicted by the line of cases beginning with *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), which hold that the Act condemns only unreasonable restraints of trade. See, e.g., *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-528 (1948); *United States* v. *duPont & Co.*, 351 U.S. 377, 387 (1956); *Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958).* The test of reasonableness is of particular importance in commercial banking because of the Congressional policy that competition in this field must be subordinated to the promotion of a sound and adequate banking system. This policy is set forth most clearly in the legislative history of the Bank Merger Act, portions of which appear in the appendix to this brief, pages 84 et seq., particularly 90, 95, 99, 100, 106. Congress rejected the strict standards of section 7 of the Clayton Act for bank mergers and instead required that the competitive factor be considered along with six banking factors, one of which is "the convenience

---

* Appellant's reference to the district court's comment that it did not consider the benefits particularly relevant (Appellant's Brief, p. 66, fn. 51) is taken out of context. The court's comment was made in discussing section 7 of the Clayton Act at a time when there was no guide from this Court on the relevance of demonstrable benefits from a merger. Since that time this Court has stated in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 334, 346 (1962) that even under section 7, consideration should be given to "countervailing competitive, economic or social advantages."

and needs of the community." It is in this context that the rule of reason must be applied.

Appellant is forced to argue that the findings of the district court on the reasonableness of the merger are clearly erroneous. Even a brief review of the evidence demonstrates that these findings are fully supported in the record.

Banks in Philadelphia have not kept pace with the ever-increasing credit requirements of large industrial and commercial enterprises in the Delaware Valley. Exhibit D 25 (R. 3157) graphically contrasts the growth of the general economy in the Delaware Valley with bank growth. Banks have lagged far behind (R. 1350-1351). The evidence establishes that there is no bank in Philadelphia today large enough to provide the services needed by many of the larger Philadelphia area customers (Fdg. 178a, R. 3513; R. 1411, 1877, 2069, 2286).

There are other measurements of the inadequacy of local banking resources. Philadelphia is fourth or fifth in a ranking of the twelve largest metropolitan areas in the United States on the basis of various measures of economic activity, yet Philadelphia ranks ninth on the basis of the size of its largest bank (Fdg. 182a, R. 3514-3515; R. 1344-1345; GX 57, R. 2531-2535). The largest bank in Philadelphia ranks twentieth in the United States and is smaller than one or more banks in San Francisco, Pittsburgh, Boston, Detroit, Cleveland and Dallas, each of which has less popula-

tion than Philadelphia (Fdg. 181a, R. 3514; R. 933-935, 1951, 2288-2290; DX 20, R. 3097; DX 24, R. 3154).

Because Philadelphia does not have a bank large enough to meet the needs of its large business enterprises, a great deal of banking business has shifted to New York and to other cities which have larger banks than has Philadelphia (Fdg. 180a, R. 3514; see fn., page 10, *supra*). It is the purpose of the proposed merger to stop this trend and, if possible, reverse it (R. 1602-1605, 1714).

The size of a bank's resources and lending limit are critical factors in the selection of banks by larger customers. This is so even though in many cases the customer's ordinary credit requirements can be satisfied, since sound business judgment requires flexibility well within a bank's lending limit to provide an adequate margin between ordinary and peak borrowing requirements (Fdgs. 179(a)a, 179(c)a, R. 3513-3514; R. 1949-1951, 2127-2128, 2098-2099, 2063). It is undesirable from the point of view both of the bank and of the customer to have loans at or near the bank's lending limit (R. 1605-1606). The record shows that as a consequence appellees have lost to larger banks customers with expanding credit requirements even though such requirements were still well below appellees' lending limits (Fdg. 179(c)a, R. 3514; R. 1609-1623).

More importantly, the size of a bank's resources affects the degree of risk which a bank may justifiably

take on loans to particular customers (Fdg. 179(b)a, R. 3514). For example, Girard has lost customers to larger banks outside Philadelphia even though the customers' needs were far below its lending limit, simply because Girard's total resources did not warrant risking in one loan an amount which the other bank with larger resources could readily make (R. 1609-1623). Such customers are far more numerous than the hypothetical "few big concerns" which appellant suggests as the only beneficiaries of the merger (Appellant's Brief, p. 72).

The merged bank will not only have a lending limit and resources more comparable to the banking needs of Philadelphia, it will also have sufficient resources to enable it to develop services which will be competitive with those offered by large banks elsewhere, such as special departments for types of loans and industry groups and more extensive foreign services (R. 1602-1603, 1706-1714). The offering of these facilities will not adversely affect existing relationships between other Philadelphia banks and their customers (R. 2070, 2122, 2146, 2178).

The public will benefit from the fact that the merged bank will be better able to hold and to obtain large customers. An analysis of the accounts of the largest customers of appellees shows that over the entire year 1960 those customers on the average maintained deposits which exceeded their loans by substantial margins. In the case of PNB average deposits were twice as large as average loans; and in the case of

Girard average deposits were more than one and a half times its average loans (DX 26, R. 3163; DX 40, R. 3181). This is the type of customer which appellees seek to hold and to acquire by the merger. The excess of deposits over loans thereby produced will constitute additional credit available in Philadelphia.

The evidence establishes that a merger is the only feasible way to obtain a bank large enough to meet the banking needs of the Philadelphia area (Fdg. 189a, R. 3516), and that, contrary to appellant's argument (Appellant's Brief, p. 68), the requirements of large borrowers cannot be satisfied by participations of several banks in one loan. The district court found that this argument "ignores again the realities of the situation" (R. 3667). Its findings 186a and 187a (R. 3515-3516) explain why such participations are unsatisfactory to both bank and customer and do not provide an effective substitute for the inadequate lending capacity of appellees.

Appellant's "summary" of the testimony of the officers of some of appellees' large customers is seriously misleading in the light of the entire testimony of those witnesses (Appellant's Brief, pp. 68-70). For example, the summary for Atlantic Refining omits the testimony that the company's expected growth will require additional banking relationships, that the company would like to deal with a Philadelphia bank, and that a $15 million lending limit would make this possible (R. 2068). The summary for Rohm & Haas omits the testimony that the lines of credit from five Phila-

delphia banks aggregating $20,000,000 constituted an unsatisfactory arrangement, and that a larger bank in Philadelphia will keep growing businesses from going elsewhere for accommodation (R. 2100-2101, 2104-2105). The summary for Triangle Publications omits the testimony that the company did not want to participate the $10 million loan because it would be more difficult to negotiate, take longer and require greater compensating deposits (R. 2117-2118), and that the company would have considered a Philadelphia bank for this loan if there had been one large enough (R. 2122). The summary for Bankers Securities omits the testimony that the company would prefer to do business with Philadelphia banks but cannot do so now because of the size of these banks (R. 2127-2132). In the summary for Sun Oil, the loan obtained by the subsidiary was $12 million and the testimony was that the subsidiary would have had the merged bank handle it if the merged bank had been in existence at that time (R. 2145). The summary for Pennsylvania Power & Light omits the testimony that the company would increase its proportion of borrowings from Philadelphia banks if there were a larger bank (R. 2177-2178), and that it would move business from its New York bank if the merged bank could develop the specialized services which are now supplied there (R. 2200). Finally, appellant omits entirely the testi-

mony of the president of Automotive Rentals, Inc., the remaining witness of that group, who listed the benefits from the merger which he expected for his company and concluded that the merger is "not only good for me, for us, from a selfish standpoint; it must be good for hundreds of others—small people, not only in the automobile field, but in other small fields of endeavor in the area that I am talking about. It makes sense to me" (R. 2154-2155).

The fundamental theory of appellant would result in banks being kept small irrespective of "the convenience and needs of the community" (Appendix, p. 81). The incapacity of Philadelphia banks to care for the banking needs of the community has produced a great flow of banking business to New York and other cities. If appellant's purpose in this case is accomplished, that disparity will be preserved, the development of a healthy competition between New York and Philadelphia will be prevented and Philadelphia banks will be frozen in their present position of relative incapacity to meet the needs of their customers, without thereby helping any other Philadelphia banks or businesses. This is to frustrate, not to accomplish the Congressional purpose in adopting the Bank Merger Act.

The proposed merger is the first major effort to provide a Philadelphia bank which can become competitive with the larger banks in New York and other

cities. The record shows how many cities smaller than Philadelphia have larger banks which presently draw business from the Philadelphia area. To prevent the creation of a bank which can offer effective competition in this field is to defeat, not to promote the purposes of the antitrust laws. This is particularly indefensible in the absence of any evidence whatever that local competition will be served by preventing the merger. All demands for smaller accommodation can be met adequately by the many banks which will continue to serve the area after the merger. Demands for larger accommodation can be met for the first time in Philadelphia by the merged bank, competitively with large banks elsewhere. The evidence shows and the district court found that the only effect that preventing the merger will have on competition will be to inhibit it.

CONCLUSION

The decision of the district court was based on a determination of the particular facts of this specific case following a thorough analysis of extensive evidence. The court concluded that appellant's claim was founded on nothing more than inferences drawn from mathematical ratios which were not shown to have any significance in the field of banking, and which were affirmatively refuted by the testimony of bankers and businessmen alike, competitors and customers of appellees and other banks in the Philadelphia area.

The decision of the district court was a necessary consequence of appellant's failure to prove any violation of the antitrust laws. The judgment below is correct and should be affirmed.

Respectfully submitted.

Arthur Littleton
Ernest R. von Starck
Donald A. Scott
Attorneys for The Philadelphia National Bank, Appellee.

Philip Price
Carroll R. Wetzel
John J. Brennan
Minturn T. Wright, III
Attorneys for Girard Trust Corn Exchange Bank, Appellee.

January 10, 1963

APPENDIX

I. Statutes.

Section 18(c) of the Federal Deposit Insurance Act, as amended by the Bank Merger Act of May 13, 1960, 74 Stat. 129, 12 U.S.C. § 1828(c)(Supp. II), provides in pertinent part:

> * * * No insured bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). * * * In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on com-

petition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency * * * shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection * * *. The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: * * * a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval. * * *

Section 215(e) of the National Banking Laws, as added, Sept. 8, 1959, 73 Stat. 462, 12 U.S.C. § 215(e) (Supp. II), provides:

The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and

mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer. The consolidated national banking association, upon the consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating banks or banking associations at the time of consolidation, subject to the conditions hereinafter provided.

II. Selected excerpts from the legislative history of the Bank Merger Act of 1960 supporting the view that the dominant intent of Congress was that any review of bank mergers should take cognizance of all the special factors which pertain to banking, money and credit.

Excerpts from "Regulation of Bank Mergers", Report of the Senate Committee on Banking and Currency together with Supplemental Views to accompany S. 1062, S. Rep. No. 196, 86th Cong., 1st Sess. (1959)

The purpose of the bill is to provide for control of all mergers by asset acquisition by banks under the jurisdiction of the Federal banking agencies, under uniform and clear standards calling explicitly for consideration of both banking factors and competitive factors, but without giving sole and controlling effect to any single factor. (p. 1)

* * * * *

Bank mergers are generally considered to be covered by the restrictions of the Sherman Antitrust Act, but up to this year, no proceeding under the Sherman Antitrust Act had been instituted which involved a bank merger or a consolidation. Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act. (Stock acquisitions by bank holding companies, as distinguished from mergers and consolidations, are subject to both the Bank Holding Company Act of 1956 and sec. 7 of the Clayton Act.) (pp. 1-2)

* * * * *

In the light of the information set forth above, there is no justification for continuance of the present incomplete and confusing statutory provisions dealing with bank mergers. On the contrary, it is essential to provide immediately for effective and uniform regulation of bank mergers, under standards appropriate to the industry. (p. 13)†

* * * * *

There is no question that competition is desirable in banking, and that competitive factors should be considered in all aspects of the supervision and regulation of banks.

But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest.

Ever since the days of the first and second Banks of the United States and *McCulloch* v. *Maryland* (4 Wheat. 316, 1819), it has been generally accepted that banking is a field subject to special regulation by virtue of its effect upon and relation to the fiscal and monetary policies of the Federal Government under article I, section 8, of the Constitution of the United States.

This Federal control over banking long antedated the antitrust laws. (p. 16)

* * * * *

† This is the concluding paragraph of the section of the Senate Report captioned "The Need for Regulation of Bank Mergers". Some of the language of that section, which appears on page 8 of that Report, is identical with language on page 5 of the House Report. (See Appellant's Brief, pp. 22, 28, 55).

Time and again the Nation has suffered from the results of unregulated and uncontrolled competition in the field of banking, and from insufficiently regulated competition. (p. 17)

* * * * *

The rapid increase in the number of small weak banks, to such a large number that the Comptroller could not effectively supervise them or control any but the worst abuses, was one of the factors which led to the panic of 1907.

The banking collapse in the early 1930's again was in large part the result of insufficient regulation and control of banks, in effect the result of too much competition.

* * * the reform legislation of 1913, while removing many of the defects of the banking system as a system, *did very little to strengthen the individual commercial bank.* * * * The country continued to be served or disserved by thousands of small, weak, independent banks having inadequate capital, incapable executives, and poor outside connections.

* * * the banking collapse did not begin in 1931, but was really under way throughout the period of the 1920's. During that decade * * * thousands of banks failed, but the appalling weakness of the banking structure was not immediately realized, because most of the failures occurred in isolated agricultural communities. ["Money and Banking," Raymond P. Kent, New York, 1947, pp. 303-304.] (p. 17)

* * * * *

It was in the light of this background that section 6 of the Federal Deposit Insurance Act

was written, requiring consideration of the following factors before granting insurance to a bank: the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the communities to be served by the bank, and whether or not its corporate powers are consistent with the purposes of the act.

The basis for handling banking through banking laws, specially framed to fit the particular needs of the field, instead of relying on unrestricted competition and antitrust laws, is set forth in "Banking Under the Antitrust Laws," by A. A. Berle (49 Columbia Law Review (1949) 589, at p. 592):

> Operations in deposit banking not only affect the commercial field, but also determine in great measure the supply of credit, the volume of money, the value of the dollar, and even, perhaps, the stability of the currency system. Within this area considerations differing from and far more powerful than mere preservation of competition may be operating under direct sanction of law. It is the theory, in ordinary commercial fields, that competition is the desirable check on price levels—the process by which the efficient are rewarded by survival, and the inefficient eliminated by failure. The price of business failures is not regarded as too high for the community to pay in view of advantages to consumers, stimulus toward greater efficiency, and freedom of enterprise. But it is doubtful (to say the least) whether any such assumption

is indulged in with respect to deposit banks; certainly the theory is not there accepted to the full extent of its logic. A bank failure is a community disaster, however, wherever, and whenever it occurs.† While competition may be desirable up to a point in deposit banking, there is a clear bottom limit to its desirability. So long as 90 percent of the monetary needs of the country are supplied through bank credit, deposits, and checks, under a system which contemplates many thousands of banks and also a uniform, smooth, free flow of bank checks, a high degree of cooperation among banks is essential. So long as certain kinds of banking paper are accepted as a basis for currency through the operations of the Federal Reserve rediscount, a high factor of uniformity is needed. The economic and social premises of the Sherman Act in respect of other businesses are not fully accepted by the Congress, the States, or the public as the only considerations applicable to deposit banking.

A BALANCED JUDGMENT REQUIRED

In considering what standards to provide for the reviewing banking agencies, the committee had before it the banking factors set forth in section 6 of the Federal Deposit Insurance Act, the differing antitrust standards of the Sherman Act and the Clayton Act, and also special provisions for regulated public utilities exempted from the anti-

† The foregoing portion of this quotation was also quoted at page 9 of the House Report.

trust laws, such as these covered by the Interstate Commerce Act.

The committee concluded that reference to the banking factors in section 6 of the Federal Deposit Insurance Act, while essential, would not alone suffice, because the section 6 standards do not give sufficient weight to the factor of competition.

The committee concluded, on the other hand, that imposing the strict rule of section 7 of the Clayton Act, as amended in 1950, as interpreted in the *Bethlehem-Youngstown* case, would give absolute and controlling weight to the lessening of competition, regardless of other factors. The committee did not consider that it would be in the public interest to regulate bank mergers under standards which would mean that the demonstrable benefits of a merger are irrelevant and outside the province of the administrator, and which would make no distinction between good mergers and bad mergers.

A number of examples were cited to the committee where the public interest would clearly require that a proposed merger should be approved even though a definite and substantial lessening of competition could be expected:

The representative of the American Bankers Association testified as follows:

> Moreover, there are certain circumstances in which bank mergers may substantially lessen competition and yet be desirable in the interest of the public and sound banking, such as the following practical examples:
>
> . . .

5. Where the acquired bank is an uneconomic unit or is too small to meet the needs of its community by providing loans of sufficient size or by providing needed banking facilities. (pp. 18-20)

* * * *

Representative Celler testified:

> In addition to the acquisition of a bank which otherwise would be faced with a possibility of failure, there are other circumstances in which, from a banking standpoint, the acquisition of a bank by another bank may be in the public interest . . . The same principle applies where there are not adequate banking facilities. These various situations are illustrative of the circumstances where the consummation of the transaction would not be contrary to the public interest. (Hearings on S. 1062, pp. 98-99)

The committee agreed that in the situation described by the witnesses, and in similar situations, approval of the merger would be in the public interest, even though this would result in a substantial lessening of competition. In cases such as these the benefits would be demonstrable, the merger would be a "good merger," and approval should be granted in spite of the lessening of competition.

Since there was widespread agreement that some mergers were in the public interest and should be approved, even though they might result in a substantial lessening of competition, the committee concluded that the strict rule of the

1950 amendment of section 7 of the Clayton Act was inappropriate to the field of banking.

"To adopt this rule for bank mergers might result in the disapproval of bank mergers which all would agree were in the public interest; it might, on the other hand, as the result of the legislative history of the new provisions for banking, bring about a relaxed and modified interpretation of section 7, which would be inappropriate in the case of ordinary unregulated industrial and commercial concerns where unrestricted competition is in the public interest. Either of these results would be undesirable. The committee, therefore, concluded that it was preferable to handle bank mergers under rules specially designed for the banking industry.

The committee concluded that the balanced approach set forth in S. 1062 was the most appropriate for the banking industry. The committee noted the close resemblance to the test provided in section 5 of the Interstate Commerce Act, and further noted that that section provides an exemption from the Sherman Act as well as the Clayton Act, a provision not contained in S. 1062.

S. 1062 provides for full consideration of the public interest in the soundness and good management of the banking system, through recognition of the several banking factors of section 6 of the Federal Deposit Insurance Act, and equally full consideration of the public interest in promoting competition and preventing monopoly. S. 1062 gives no one of these factors controlling weight, but requires that all be considered, that

all be duly weighed, and that a balanced judgment be reached by the banking agency on the basis of all these factors. (pp. 20-21)

* * * * *

The committee is convinced that there is need for uniform regulation of bank mergers, consolidations, and other asset-acquisition transactions involving banks insured by the Federal Deposit Insurance Corporation. The proposed legislation would achieve this by placing the administration of this law in the hands of the Federal banking supervisory agencies. This bill follows the traditional structure of statutes enacted by the Congress in the regulation of other aspects of the banking industry. (p. 21)

* * * * *

In passing on applications for mergers, the agency is to take into consideration both the banking factors and the competitive factors which may be involved in the merger. No one of the banking factors alone will be of controlling weight, and no one of the competitive factors alone will be of controlling weight. All must be considered and weighed together by the banking agency involved before it can reach its decision on the application. (p. 22)

* * * * *

The committee recognizes that in a relatively small number of cases the balancing of the various factors will be difficult—some banking factors may be favorable, some may be unfavorable; some competitive factors may be favorable, others unfavorable.

In such cases, the decision will not be simple. Full consideration will have to be given to the basic purposes of the statute: to promote a sound banking system, in the interest of the Government, borrowers, depositors, and the public; and to promote competition as an indispensable element in a sound banking system. (p. 23)

* * * * * *

The Attorney General is required to give a report on the competitive factors involved in the proposed merger. Under S. 1062 the competitive factors involved in the merger are only one element of several to be considered in passing on the application. The committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision. And, of course, the banking agencies are not bound in their consideration of the competitive factors by the report of the Attorney General. They will have much information in their own files, and they may obtain information or advice on the competitive factors from other sources. The committee amendment is only intended to make sure that the banking agencies get a report on the competitive factors from the Attorney General in each case. (p. 24)

Excerpts from "Regulation of Bank Mergers", Report of the House Committee on Banking and Currency on S. 1062, H. Rep. No. 1416, 86th Cong., 2nd Sess. (1960)

There are differing views about the effect and the significance of the mergers which have taken

place. But there is general agreement that legislation providing for uniform and effective regulation of mergers is required for the future. (p. 5)

* * * * *

The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help. (p. 5)

* * * * *

Because section 7 is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers "little help," in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers. (p. 9)

* * * * *

Because banking is a licensed and strictly supervised industry that offers problems acutely different from other types of business, the bill vests the ultimate authority to pass on mergers in the Federal bank supervisory agencies, which have a thorough knowledge of the banks, their personnel, and their types of business. For the same reason, the bill requires consideration of the six banking factors now listed in section 6 of the Federal Deposit Insurance Act. Thus the supervisory agency would consider the financial history

and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of the Federal Deposit Insurance Act.

Reference to these factors, while essential, would not alone suffice, because the section 6 standards do not give sufficient weight to the factor of competition. (pp. 9-10)

* * * * *

This course [to apply the Clayton Act test generally, with specific exemptions] seems unnecessarily hazardous, however, in view of the wide variety of situations in which a merger may be proposed in all good faith as a means of providing better banking service. Your committee concluded that it would be unwise to attempt to anticipate all possible situations where a merger would benefit the public, and incorporate them in a rigid, specific list of exemptions.

Your committee is convinced the Senate's approach is basically sound. Where demonstrable benefits would flow from a proposed merger, these should be weighed against any adverse effect on competition. Your committee feels, however, that the language of the Senate bill can be improved, to insure that the intent indicated in the legislative history of the bill in the Senate will be properly carried out. Your committee concurs with the Senate committee report's repeatedly expressed intent to allow approval of bank mergers that would be in the public interest. (p. 11)

Excerpts from Senate debate on S. 1062, May 6, 1960, Vol. 106 Congressional Record.

Mr. Fulbright.†

Mr. President, I move that the Senate concur in the amendment of the House.

* * *

As it passed the Senate, S. 1062 expressed the view of the Senate, for the third time, that bank mergers should be regulated by the Federal banking agencies on the basis of banking factors and competitive factors, with no single factor being in itself controlling. S. 1062 was a clear statement, for the third time, of the Senate's view that the provisions of section 7 of the Clayton Act should not apply to bank mergers.

The amendments to S. 1062 made by the House do not change this aspect of the bill. The House has agreed with the Senate that bank mergers should be controlled by the Federal banking agencies on the basis of both banking factors and competitive factors, and that section 7 of the Clayton Act should continue to be inapplicable to bank mergers.

Banking is regulated and subject to many controls not applicable to the ordinary industrial or commercial enterprise: entry into the field of banking is restricted; the establishment of branches is restricted; and the practices and procedures of banking, from the payment of interest on deposits to the kinds of loans made and the reserves which must be maintained, are closely regulated and controlled. Competition in banking is desirable and beneficial; but unrestricted competition in banking, with the bank failures which would result, is no more possible than it is in

† Co-sponsor of S. 1062.

field of public utilities or other industries affected to a greater or lesser extent with the public interest. Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.

The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand. The 1950 amendment to section 7 of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from section 7 of the Clayton Act.

It is not clear whether the Sherman Antitrust Act of 1890 would now be held to apply to banking in general and to bank mergers in particular, though it seems clear that Senator John Sherman, the former Secretary of the Treasury, for whom the act was named, and the 51st Congress, did not expect or intend banking to be covered by an act applicable to interstate commerce. And even if the Sherman Act is held to apply to banking and to bank mergers, it seems clear that under the rule of reason spelled out in the Standard Oil case, different considerations will be found applicable, in a regulated field like banking, in determining whether activities would "unduly diminish competition," in the words of the Supreme Court in that case. (p. 9711)

* * * *

The requirement that a favorable finding must be made if the merger is to be approved means only that a beneficial result must appear after the weighing of the seven specific factors set forth in the bill. It does not require the agency to go beyond these seven factors and find an independent and separate public interest in the merger.

The requirement of a favorable finding after weighing these seven factors does not seem out of place in this legislation. A favorable finding would have to be made, for example, in other cases which the banking agencies must consider, such as the chartering of a new bank. It is this distinction between banking and other businesses which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies to other mergers. (p. 9712)

* * * * *

Mr. Bennett.†

Mr. President, in order to make clear to the banking agencies, which will administer this act, the understanding and intention of the Senate in accepting the amendments of the House and passing the amended bill, I ask unanimous consent that this set of questions and answers be printed in the Record following the statement by the Senator from Arkansas, as though I had asked the questions and the Senator from Arkansas had made the answers.

The PRESIDING OFFICER. Without objection, it is so ordered.

† Member of Senate Committee on Banking and Currency.

EXHIBIT 1

BANK MERGER BILL

Question. As I understand it, this bill is not directed against nor intended to proscribe or limit size as such, without regard to the banking and competitive tests set forth in the bill, and hence a merger of two large banks should be approved if found to be in the public interest under the tests set down in the bill. Suppose, for example, a situation where such a merger would increase the extent, quality, and efficiency of services rendered to the public, enhance local, regional, or national competition, and meet all the other specific tests in the bill, would not such a merger be considered to be in the public interest under this bill, regardless of size?

Answer. Yes. The bill is not directed against size as such, nor does it impose limits on the size of banks. Size may be, of course, an element to be considered as part of the banking tests and as part of the competitive test under the bill. But it is not controlling. If a merger of two large banks qualifies under the tests set forth in the bill, it should be approved and it will be approved, no matter how big the two banks may be.

Question. The competitive factor in the bill I take to refer, in appropriate cases, not only to local but also to State, regional, and national competitive effect. Is this correct?

Answer. Yes. The Federal banking agency reviewing a proposed merger should consider whatever field of competition the merging banks are engaged in and the new bank will engage in.

Some banks are engaged only in local competition. Other banks are primarily engaged in regional competition. Other banks engage in national or international competition. The field of competition which is actually involved is the field which should be given consideration in reviewing a merger. This is true also of the Justice Department reports on the competitive factors involved in the merger. These, too, should be concerned with the kinds of competition the two banks are now engaged in and the kind of competition the merged banks will be engaged in.

Question. In considering a proposed merger, should the needs of the community and the area and the country as a whole for increased financial services resulting from an expanding economy be considered?

Answer. Yes. The Federal banking agency reviewing a merger under S. 1062 would certainly give due regard to the adequate accommodation of the growing capital requirements of an expanding economy in the community, in the area, and in the country generally. This would not, of course, be the controlling factor any more than any other single factor and, of course, other means of providing increased financial services would be borne in mind.

But there is no question that the Federal banking agency should give due regard to the adequate accommodation of the growing capital requirements of an expanding economy.

Question. In considering a proposed merger, would the responsible Federal banking agency be

able to take into consideration the competition which the merging banks face, and the merged bank would face, from other kinds of financial institutions—savings and loan associations, credit unions, insurance companies, finance companies, and the like?

Answer. Yes, indeed. All competition which the merging banks now face, and which the merged bank would face, must be taken into consideration by the banking agency. This includes both competition from other banks and trust companies and competition from other financial institutions which may provide the same or similar services. It includes competition for the public's funds, in the form of deposits, savings accounts, and the like, and it includes competition in supplying the public's needs for funds in the way of personal loans, consumer credit, mortgages, business loans, and so on.

Question. Mergers already effected have given some banks distinct competitive advantages because of increased lending limits, increased quantity and quality of services, increased availability of highly specialized and technical personnel, and increased overall resources. Other banks have not so grown in size through mergers because of lack of feasible merger opportunities, State laws, management policy, or other reasons. If the effect of the adoption of this bill is to discriminate against these latter banks and thereby to affect adversely their future opportunity to acquire or regain reasonable competitive equality through merger, then we shall be protecting and making permanent a competitive advantage or, a

kind of monopolistic position. It is my understanding that such a discriminatory result is not intended, and that the competitive test in this bill should not be so construed. Is that correct?

Answer. S. 1062 is not intended to have any discriminatory results. It is not intended to discriminate against banks which have been unable to merge in the past because of State laws or any other reasons. The fact that a bank has been unable to merge in the past, and therefore is at a competitive disadvantage with other banks, is something which can be and should be taken into consideration by the banking agency reviewing a merger application. The bill is not intended to prevent banks which have not been able to merge from acquiring or regaining reasonable competitive equality through merger.

Of course, this does not mean that merely because a bank was unable to grow by merger before the enactment of S. 1062, it would thereby have a right to engage in a merger which otherwise would be ruled out by the standards of S. 1062. The standards set forth in S. 1062 are the controlling tests; the competitive disadvantage which a bank is suffering from because it could not previously merge is to be considered as just one of the factors entering into these tests. (p. 9713)

* * * * *

Statement by Senator Johnson of Texas.

This bill establishes uniform and clear standards, including both banking and competitive factors, for the consideration of proposed bank mergers. It eliminates a number of gaps in the

statutory framework, which now permit many bank mergers to occur with no review by any Federal agency. It provides for a thorough review by the appropriate Federal bank supervisory agency, under these comprehensive standards, and with the benefit of any information which may be supplied by the Department of Justice in the report required from them, of the bank mergers by asset acquisitions and other means which are now and will continue to be exempt from the antimerger provisions of section 7 of the Clayton Antitrust Act. (pp. 9714-9715)

Excerpts from House debate on S. 1062, April 4, 1960, Vol. 106 Congressional Record

Mr. Spence.†

This puts control in the banking agencies, which have expert knowledge of the problems involved. At the same time, they will be required to get a report from the Attorney General, whose experience in the antitrust field qualifies him to furnish valuable advice in the administration of the bill. (p. 7257)

* * * * *

Mr. Brown of Georgia.‡

This puts the responsibility for acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank

† Chairman of House Committee on Banking and Currency.

‡ Chairman of Subcommittee No. 2 of House Committee on Banking and Currency which held the hearings on S. 1062.

which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have primary responsibility in deciding whether a proposed merger would be in the public interest. (p. 7257)

* * * * *

There is general agreement that stronger, clearer, more uniform controls over bank mergers are needed. This bill will meet this need, in a way that assures a balanced consideration of the total effects of a merger, with appropriate consultation among all interested agencies. In this way, we can expect that bank mergers which will be beneficial will be approved, and those which will not will be stopped. (p. 7258)

* * * * *

Mr. Celler.†

In these circumstances, I think that the bill, provided it is properly administered, constitutes a significant step forward. True, it does not contain all the safeguards that I believe necessary to cope with the rash of bank mergers that have beset the Nation. For example, it would, in my opinion, have been preferable to have made provision for a hearing on the record and the right of court

† Chairman of House Committee on the Judiciary.

review, together with adoption of the competitive test contained in section 7 of the Clayton Act with specific exceptions for cases involving probable failures, management problems, inadequate capital or unsound assets, or overbanked communities. (p. 7258)

* * * * * *

Mr. Multer.†

Much controversy arose during the course of the hearings on this bill in both Houses of Congress with reference to the extent that the competitive and monopolistic factors should be considered as determinative of these applications. All concerned agreed that all of the banking factors must be considered. There also seemed to be no disagreement that the competitive and monopolistic factors should also be considered. Under the Sherman Antitrust Act and under the Clayton Act the sole tests revolve around the lessening of competition and the creation of monopolies.

The language of S. 1062 as amended by the House Banking and Currency Committee and as it appears in the bill we are now about to pass in the House makes it clear that the competitive and monopolistic factors are to be considered along with the banking factors and that after considering all of the factors involved, if the resulting institution will be in the public interest, then the application should be approved and otherwise disapproved. (p. 7259)

† Member of Subcommittee No. 2 of House Committee on Banking and Currency.

Excerpts from Senate debate on S. 1062 prior to amendment by House, May 7, 11, and 13, 1959, Vol. 105 Congressional Record†

Mr. Robertson.‡

These illustrative examples indicate the difficulties of applying the language of the Clayton Act to bank mergers. They also indicate the basic reasoning behind the committee's bill. This is that the banking business is fundamentally different from ordinary business. It is highly regulated and restricted. It is a quasi-public utility. I do not believe that anyone could safely say that the exceptions provided in the O'Mahoney amendment are the only ones which would occur and in which a merger might be desirable, even though it would substantially lessen competition. (p. 7692)

* * * * *

Letter from Mr. Coburn, General Counsel of the Federal Deposit Insurance Corporation.

Our economy is generally expanding, but the rate of growth will vary as between regions and the banks must be able to adjust to and serve the ever-changing needs of trade and commerce within their communities. With growing communities, there is need for enlarged financial services, and hence it is found that the needs for larger

† These relate to the amendment offered by Senator O'Mahoney which would have given controlling effect to the standards of the Clayton Act with specific and narrow exceptions. This amendment was defeated by a vote of 55 to 29. (p. 8139)

‡ Chairman of Senate Committee on Banking and Currency and co-sponsor of S. 1062.

loans, the need for additional categories or types of credit, the need for generally expanded banking services may be one of the underlying factors that encourage merger transactions. Within proper limits, these may be representative of sound justification for mergers which are consistent with the public interest.—(p. 7827)

* * *

Mr. Robertson:

The situation should not continue any longer. Competition in banking should be encouraged and safeguarded. Vigorous competition between sound and strong banks in a sound banking system is important and desirable. Such competition will benefit depositors, borrowers, and the Government, and all of them have a vital interest in banking.

But unlimited and unrestricted competition in banking is just not possible. We have had too many panics and banking crises and bank failures, largely as the result of excessive competition in banking, to consider for a moment going back to the days of free banking or unregulated banking.

Instead, in the National Bank Act of 1864, the Federal Reserve Act of 1913, and the Banking Acts of the 1930's including particularly the Federal Deposit Insurance Act, we have taken the position, from which I trust we will never retreat, that banking is affected with a public interest and must be regulated like public utilities and monopolies.

* * *

The significance of the banking system to the monetary and fiscal policies of the Government,

to the businesses and individuals who depend on bank loans for growth and development, and to depositors who must have confidence in the security of their deposits, is too important to permit unrestricted competition.

In the opinion of the committee it is impossible to subject bank mergers to the simple rule of section 7 of the Clayton Act. Under that act, a merger would be barred if it might tend substantially to lessen competition, regardless of the effects on the public interest.

* * *

The committee did not recommend that bank mergers should be exempted from the Sherman Act, but it does recommend continuance of the existing exemption from section 7 of the Clayton Act. (p. 8076)

* * * * *

Mr. Javits.†

The second point, which I think is very important, is this: Shall we give the Attorney General more authority with respect to bank mergers than with respect to other mergers? I feel that there is reason for even less authority, because there are other regulatory agencies, such as the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board. There is not the same situation in respect of ordinary corporate merger cases. Here we have a regulated situation. (p. 8129)

* * * * *

† Member of Senate Committee on Banking and Currency.

Mr. Robertson.

Mr. President, if the Congress wishes to put banks on the same basis as steel corporations, automobile corporations, and other corporations, Congress should repeal all present laws on the subject of banks, and could put them lock, stock, and barrel under the Clayton Act, not only in the case of mergers by stock acquisition, but also in the case of mergers by asset acquisition. But if the Senator from Tennessee were to introduce a bill to that effect, it would not receive 10 favorable votes; and he would find that such a bill would be bitterly criticized by his banking friends in his home State. (p. 8132)